SECTION 7—MEDICAL BENEFITS

Introduction

Section 7 describes an employer's duty to provide medical and related services necessitated by its employees' on-the-job injuries, claimant and employer's rights and obligations regarding compensable services, and the Secretary's authority to oversee claimant's medical treatment.

While the Secretary and her designees, the district directors, have discretionary authority to supervise an employee's care, the administrative law judges have the authority to resolve factual disputes which arise over non-discretionary matters. *See Weikert v. Universal Mar. Serv. Corp.*, 36 BRBS 38 (2002) (while active supervision of a claimant's medical care is performed by the district director, issues which involve factual disputes as opposed to those which are purely discretionary are for the administrative law judge to decide, and in this case, he erred in not determining claimant's entitlement to hearing aids); *Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997)(Brown, J., concurring) (Board rejected the Director's contention that only the district directors have the authority to determine the appropriateness of medical care and held that a claim for medical benefits that raises disputed factual issues regarding the need for specific treatment for a work-related injury must be referred to an administrative law judge); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989) (administrative law judge has authority to address authorization and refusal to provide treatment under Section 7(d)).

Obtaining payment for medical services and supplies pursuant to Section 7 will entitle claimant's counsel to an attorney's fee award pursuant to Section 28. *Oilfield Safety & Marine Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980), *aff'g Hansen v. Oilfield Safety, Inc.*, 8 BRBS 835 (1978) and 9 BRBS 490 (1978); *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984); *Dolge v. Navy Resale System Office*, 7 BRBS 967 (1978); *Simeone v. Universal Terminal & Stevedoring Corp*., 5 BRBS 249 (1976).

Medical benefits are not "compensation" for purposes of Section 13, and the payment of medicals will not toll the Section 13 limitations period to one year from their last payment. *Marshall v. Pletz*, 317 U.S. 383 (1943). Thus, medical benefits are never time-barred. *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. en banc); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990); *Mayfield v. Atl. & Gulf Stevedores*. 16 BRBS 228 (1984). In *Strachan Shipping Co. v. Hollis*, 460 F.2d 1108, 1116 (5th Cir.), *cert. denied*, 409 U.S. 867 (1972), the Fifth Circuit held employer had a continuing obligation to provide medical care even though claimant's request for modification was untimely (note that the Supreme Court rejected the *Hollis* interpretation which resulted in the claim's untimeliness under 22 in *Intercounty Constr. Co. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975)).

In *Marshall,* the Court explained that medical benefits are generally not considered to be "compensation" because, in the normal case, the insurer defrays the expense of medical care but does not pay the injured employee anything on account of such care. Only if an employer and insurer fail to furnish such care does the employee procure it for himself and then obtain an award of reimbursement. The Fifth Circuit addressed this language in holding that unpaid medical benefits are included in "compensation" for purposes of enforcement proceedings under Section 18. In *Lazarus v. Chevron U.S.A., Inc.*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992), the court stated that the separate treatment of medical care and compensation in many sections of the Act can be explained by the fact that while death and disability benefits generally come in the form of monetary compensation from employer to employee, Section 7 envisions that employers would provide medical care by directly paying the provider. Monetary payments to employees for medical expenses become necessary, however, in cases where the employer has refused to provide medical care and the employee must obtain it himself and file a claim against the employer. Awards of medical benefits under these circumstances are enforceable.

Digests

In proceedings relating to calculation of employer's lien for payments under the Act under Section 33(e), the court held that employer was not entitled to include its costs for medical examinations by physicians it selected. Examinations by physicians chosen by employer cannot be classified as either compensation paid to employees or medical care necessary for treatment or the process of recovery; these examinations are merely a way an employer can double-check on the prognosis supplied by the treating physician chosen by the employee. *Castro v. Maher Terminals, Inc.*, 710 F. Supp. 573 (D.N.J. 1989).

Since medical expenses are not paid in installments and are not within the definition of compensation under Section 2(12), Section 14(j) does not afford employer the right to reduce its liability for medical benefits under the administrative law judge's award by the amount of its voluntary disability payments. *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, 924 F.2d 1055 (5th Cir. 1991)(table).

The Board held that claimant's counsel is entitled to attorney's fees for work on appeal because claimant established a work-related injury, making employer liable for claimant's medical care. *Gencarelle v. Gen. Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989).

A claim for medical benefits is never time-barred and when counsel establishes claimant's entitlement to medical expenses, he has successfully prosecuted the claim, thereby entitling him to attorney's fees. *Gardner v. Railco Multi Constr. Co.*, 19 BRBS 238 (1987), *vacated on other grounds*, 902 F.2d 71, 23 BRBS 69(CRT) (D.C. Cir. 1990).

The Board held that claimant's counsel is entitled to attorney's fees under Section 28(b) where he establishes claimant's right to payment of past medical benefits and the right to

additional future medical benefits. (Previous cases had stated this under Section 28(a)). This is so even though due to employer's large overpayment, claimant may not realize the award for many years. *Geisler v. Cont'l Grain Co.*, 20 BRBS 35 (1987).

Two claimants who had no measurable hearing impairment under Section 8(c)(13) were denied disability benefits but were awarded medical benefits and a fee. The court rejected employer's argument that since claimants had no measurable impairment, they could not receive medical benefits. Nonetheless, the court reversed claimant Buckley's award of medical benefits, noting that there was no evidence of past expenses or of a need for future treatment; since the fee award was dependent on this award, it was also reversed. Regarding claimant Baker, the court found he presented no evidence of medical expenses incurred except for his initial evaluation by Dr. Wold; the only evidence of potential future medical expenses was his report recommending periodic hearing evaluations and stating that Baker was a "candidate for amplification." However, another doctor opined that a hearing aid would not help, and the administrative law judge's decision did not state which portions, if any, of the Wold report he credited. The court therefore vacated the award of medical benefits except insofar as it required employer to reimburse Baker for Wold's evaluation and remanded for findings on the existing record regarding which future medical services are reasonably necessary and a fee tailored to claimant's limited success. *Ingalls Shipbuilding, Inc. v. Director, OWCP, [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

The right to medical benefits is never time-barred; accordingly, a claimant may be entitled to medical benefits despite her failure to timely file her claim in compliance with Section 13 of the Act. Entitlement to medical benefits, however, is contingent upon a finding of a causal relationship between the injury and employment. The Board remanded this case for the administrative law judge to make the necessary findings. *Wendler v. Am. Nat'l Red Cross*, 23 BRBS 408 (1990) (McGranery, J., dissenting on other grounds). *Accord Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32 (1989); *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986) (disability claim time-barred by Section 12).

The Board explained the basis for the holding that medical benefits are never time-barred. The Fifth Circuit, in *Hollis*, 460 F.2d 1108, held that an employer has a continuing duty to furnish medical care with respect to work-related disabilities even if the disability claim is time-barred. Moreover, the Supreme Court in *Marshall*, 317 U.S. 383, held that payment of medical benefits is not payment of "compensation" within the meaning of Section 13. Section 7 provides medical benefits for an "injury," and therefore, the fact that a disability may not be compensated is not determinative of claimant's entitlement to medical benefits. *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. en banc).
The Board held that the administrative law judge erred in awarding interest on the medical expenses claimant paid because there was no evidence in the record indicating that claimant had in fact made any payments to the health care providers or that the providers charged claimant interest on his unpaid bills. The Board also rejected the argument that health care

providers are entitled to interest on claimant's unpaid medical bills. *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988) (Feirtag, J., dissenting in part).

The Board's approach in *Pirozzi* was rejected by the Ninth Circuit. The court held, in accordance with the Director's view, that interest may be assessed against employer on overdue medical expenses, whether reimbursement is owed to the provider or to the employee. The medical providers are also "persons seeking benefits" for purposes of Section 28(a) and entitled to employer's payment of their attorney's fee. *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993), *rev'g Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991).

In a case of first impression, the Board held that claimant is not entitled to a Section 14(f) assessment on medical benefits that were not timely paid. The Board also stated that interest cannot be assessed on past-due medical benefits that claimant has not paid himself. *Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

In a case arising in the Eighth Circuit, the Board affirmed the administrative law judge's reliance on the Ninth Circuit's decision in *Hunt*, 999 F.2d 418, 27 BRBS 84 (CRT), and held that claimant is entitled to interest on past-due medical benefits, whether the costs were initially borne by claimant or the medical providers. In so doing, the Board acknowledged that the Ninth Circuit adopted the reasonable interpretation of the Director, and the Board **overruled** its decisions to the contrary in *Pirozzi*, 21 BRBS 294, and *Caudill*, 22 BRBS 10. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997).

Pursuant to *Lazarus*, 958 F.2d 1297, 25 BRBS 212(CRT), the Board held that if, on remand, the district director finds that employer untimely reimbursed claimant for a medical bill he had paid, employer is liable under Section 14(f) for a twenty percent assessment. This holding is limited to medical expenses paid by claimant which employer must reimburse. In *Caudill*, 22 BRBS 10, the Board had held that Section 14(f) was not applicable to the medical benefits in that case because there was no indication that the medical benefits were payable to the claimant. *Estate of C. H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009).

The Fifth Circuit held that medical benefits are included in "compensation" for purposes of enforcement proceedings under Section 18(a). The court therefore held that the district court erred in dismissing claimant's petition for enforcement of the deputy commissioner's supplementary order compelling employer to pay claimant's medical expenses on the ground that medical expenses are not included in compensation. Nonetheless the court affirmed the district court's dismissal of claimant's petition on the ground that the administrative law judge's underlying compensation order was not final and enforceable since it did not specify the amount of the medical expenses to be awarded and the method for calculating them. The court also held that the deputy commissioner further

compounded this error by issuing the supplementary order without resolving the amount of medical expenses at issue in an informal conference and by simply accepting the amount claimant asserted was in default. *Lazarus v. Chevron U.S.A., Inc.*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992).

The Board vacated that portion of the district director's order which held employer liable for contested medical bills which were not part of the record before the administrative law judge, as he exceeded his authority in awarding payment of those contested bills. Claimant may request that the case be referred to an administrative law judge if she wishes to pursue payment of the bills. *Plappert v. Marine Corps Exch.*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997).

The Board affirmed the administrative law judge's denial of claimant's request for reimbursement for expenses related to pain management treatment pursuant to 29 C.F.R. §18.6(d), for the duration of the time claimant refused to undergo a medical examination ordered by the administrative law judge. The Board noted that this action is not inconsistent with Section 7(d)(4), which addresses only the suspension of compensation, or Section 27(b) dealing with sanctionable conduct. *Dodd v. Crown Cen. Petroleum Corp.*, 36 BRBS 85 (2002).

The Board held the administrative law judge correctly determined, consistent with the last employer rule, that SSA is liable for all reasonable and necessary medical expenses related to claimant's work injuries. The Board clarified that SSA cannot be held liable for any expenses related to medical treatment incurred prior to the time it employed claimant. The Board remanded the case for the administrative law judge to address which medical expenses are outstanding. *Lopez v. Stevedoring Services of Am.*, 39 BRBS 85 (2005), *aff'd*, 377 F. App'x 640 (9th Cir. 2010).

The Board held that employer's continuing voluntary payment of medical benefits directly to claimant's health care providers does not constitute the payment of "compensation" for purposes of tolling the one-year period for requesting Section 22 modification. The Board found no basis for adopting a different construction of the term "compensation" for purposes of the Section 22 limitations period than that adopted by the Supreme Court in *Marshall v. Pletz*, 317 U.S. 383 (1943) in the context of the Section 13(a) statute of limitations. Distinguishing the Fifth Circuit's decision in *Lazarus*, 958 F.2d at 1301, 25 BRBS at 148(CRT), the Board stated that this case does not present facts involving the payment of medical benefits to a claimant as reimbursement for expenses or debts incurred in obtaining medical treatment. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 43 BRBS 179 (2010), *aff'd*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir. 2011, *cert. denied*, 565 U.S. 1058 (2011).

The Fourth Circuit affirmed the decision of the Board that the administrative law judge properly denied claimant's request for modification as untimely. The court held that employer's voluntary

payment of medical benefits to claimant's health care providers did not constitute "compensation" for purposes of tolling the Section 22 statute of limitations. The court stated that its construction of "compensation" in Section 22 as not including the payment of medical benefits is consistent with that section's legislative history, the purposes of Section 7, and the Supreme Court's holding in *Marshall v. Pletz*, 317 U.S. 383 (1943), that medical care is not "compensation" within the meaning of Section 13(a). The court further stated that equating medical benefits with compensation under Section 22 would effectively write out of the statute the one-year limitations period for requesting modification. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir. 2011), *cert. denied*, 565 U.S. 1058 (2011).

In affirming the finding that LIGA is fully liable for claimant's medical benefits as the responsible carrier, the Board rejected LIGA's contention that there could be a double recovery of medical benefits. If claimant paid the medical benefits himself, he is entitled to be reimbursed by employer. 33 U.S.C. §907(d). If a private health insurer paid medical benefits, it has a statutory right to intervene to recover from employer the "reasonable value of such medical or surgical treatment" obtained by the employee. 33 U.S.C. §907(d)(3). Neither claimant, the health care provider, nor a private insurer can recover doubly under the Act. *R.H. [Harvey] v. Baton Rouge Marine Contractors, Inc.*, 43 BRBS 63 (2009), *aff'd sub nom. Louisiana Ins. Guar. Ass'n v. Director, OWCP*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010).

The Fifth Circuit affirmed the finding that LIGA is fully liable for benefits as the responsible carrier under the Act. The court rejected LIGA's contention that it is entitled to a credit for medical benefits because claimant is covered by health insurance through his retirement plan. There is nothing in the record indicating that claimant's health insurance carrier would cover work-related asbestos injuries nor is there evidence that any carrier paid or would pay an amount for which LIGA should then receive a credit. *Louisiana Ins. Guar. Assoc. v. Director, OWCP [Harvey]*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010).

The administrative law judge correctly stated that the district director has the sole authority to determine the extent of necessary home modifications for claimant, a bi-lateral amputee. Medical issues involving the exercise of discretion are within the purview of the district director. *Compare Jackson v. Universal Mar. Serv. Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring) *with Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997) (Brown, J., concurring). The necessity of home modifications has been established by the administrative law judge's findings of fact. Thus, the district director, in the exercise of sound discretion, is charged with selecting the modifications and is not bound by the administrative law judge's preference for employer's plan. The Board affirmed the administrative law judge's remanding the case to the district director. *Teer v. Huntington Ingalls, Inc.*, 53 BRBS 5 (2019).

Section 7(a) - Necessary Treatment

Section 7(a) states

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §907(a).

The applicable regulations expand on this provision, specifying that compensable care

> shall include medical, surgical, and other attendance or treatment, nursing and hospital services, laboratory, X-ray and other technical services, medicines, crutches, or other apparatus and prosthetic devices, and any other medical service or supply, including the reasonable and necessary cost of travel incident thereto, which is recognized as appropriate by the medical profession for the care and treatment of the injury of disease.

20 C.F.R. §702.401(a). Section 702.402 provides that it is employer's duty to furnish appropriate care as defined in Section 702.401(a). Section 702.403 provides that the employee shall have the right to choose his attending physician, *see* Section 7(b), *infra*, and that in determining the choice of physician, availability, the employee's condition and the method and means of transportation must be considered. It provides that a reasonable travel distance generally is 25 miles from the place of injury or employee's home, but other factors must be considered.

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary for treatment of a work injury. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).

The employee must establish that the medical expenses are for treatment of the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981) (Miller, J., dissenting); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). Whether a specific condition for which claimant has been treated is work-related is a causation issue under Section 2(2), and the Section 20(a) presumption applies to this issue. However, the presumption does not aid claimant in establishing entitlement under Section 7. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Shahady v. Atlas Tile & Marble Co.*, 13 BRBS 1007 (1981) (Miller, dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983) (Section 20(a) does not apply to Section 7). Claimant must establish that treatment is reasonable and necessary for his work-related condition and that he has met the other requirements for employer to pay medical benefits. In this regard, the Fourth Circuit held that the presumption does not relieve the claimant of

his burden of proving the elements of his claim for medical benefits and reversed the Board's decision requiring that employer prove with substantial evidence that claimant's private physician did not file a report pursuant to Section 7(d). *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977).

Medical care must be appropriate for the injury. 20 C.F.R. §702.402. Therefore, an administrative law judge may reject payment for unnecessary treatment. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255 (1984); *Scott v. C & C Lumber Co.*, 9 BRBS 815 (1978). Claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner*, 16 BRBS at 257-258. An administrative law judge may not deny a medical expense simply because a physician's expertise, customary fees or result of treatment were not documented. *Id*. at 257.

The Ninth Circuit has held that, although the employer is not required to pay for unreasonable and inappropriate treatment, when the patient is faced with two or more valid medical alternatives, it is the patient in consultation with his own doctor who has the right to choose his own course of treatment. The administrative law judge may not find that the course chosen by claimant is unreasonable or unwarranted if no doctor states that the treatment is unnecessary or unreasonable. *Amos v. Director, OWCP*, 153 F.3d 1051 (1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999).

Section 7 does not require that an injury be economically disabling in order for claimant to be entitled to medical expenses; it requires only that the injury be work-related. *E.g., Weikert v. Universal Mar. Serv. Corp.*, 36 BRBS 38 (2002); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989); *Winston*, 16 BRBS at 174. Treatment is compensable even though it is due only partly for a work-related condition. *Kelley v. Bureau of Nat'l Affairs*, 20 BRBS 169 (1988); *Turner*, 16 BRBS at 258.

The employer is liable for medical services for all legitimate consequences of the compensable injury, including the chosen physician's unskillfulness or errors of judgment. *Lindsay v. George Washington Univ.*, 279 F.2d 819 (D.C. Cir. 1960); *see also Austin v. Johns Manville Sales Corp.*, 508 F. Supp. 313 (D. Me. 1981); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

Employer is liable for all medical expenses for conditions which are the natural and unavoidable result of the work injury and are not due to an intervening cause. *See* Section 2(2) of the desk book. For example, an employer must pay for the treatment of an employee's myocardial infarction if the administrative law judge finds that it is causally related to a prior work-related injury. *Atl. Marine, Inc. v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'g* 12 BRBS 65 (1980). In *Lira v. Bludworth Shipyard, Inc.*, 14

BRBS 682 (1982), the Board held that an employer must pay for an injured employee's detoxification from narcotics when the employee, a former drug addict, became re-addicted as a result of treatment for a work-related back injury. On appeal, the order of payment was reversed on the ground that the re-addiction was not due to the work-related injury but rather to the employee's intentional concealment of his past addiction which constituted an intervening cause. In *dicta,* the Fifth Circuit stated that it assumed that the former case would require payment. *Bludworth Shipyard, Inc. v. Lira* , 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983).

In a multiple injury case with multiple employers, the responsible employer is also liable for medical benefits. Thus, if the disability results from aggravation of an injury compensable under the Act, incurred while the employee is working for a second covered employer, the second employer is liable for medical expenses due to the new injury. *Lopez v. Stevedoring Services of Am.*, 39 BRBS 85 (2005), *aff'd*, 377 F. App'x 640 (9th Cir. 2010); *Abbott v. Dillingham Marine & Mfg. Co.*, 14 BRBS 453 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982).

If the administrative law judge finds that an employee's disability is solely psychological, he may decline to award the medical expenses incurred in treating a physical condition. *Dygert v. Mfr. Packaging Co*., 10 BRBS 1036 (1979).

The administrative law judge is required to make specific findings of fact regarding an employer's claim that a particular expense is non-compensable. *Monrote v. Britton*, 237 F.2d 756 (D.C. Cir. 1956). The employer must raise its challenge to the reasonableness and necessity of treatment before the administrative law judge, *Salusky v. Army Air Force Exch. Serv.*, 3 BRBS 22 (1975); a court of appeals will not consider this issue unless there is evidence regarding it in the record. *Crescent Wharf & Warehouse Co. v. Pillsbury*, 93 F.2d 761 (9th Cir.), *cert. denied*, 304 U.S. 571 (1938). The Board will not consider requests first raised before it. *Luna v. Gen. Dynamics Corp*., 12 BRBS 511 (1980).

Employer has a continuing obligation to pay an injured employee's medical expenses, even if the claim for Section 8 compensation is time-barred by Sections 12 or 13, *Strachan Shipping Co. v. Hollis*, 460 F.2d 1108 (5th Cir.), *cert. denied*, 409 U.S. 867 (1972); *Mayfield*, 16 BRBS at 230; *Dean v. Marine Terminals, Inc.*, 7 BRBS 234 (1977); *Wilson v. S. Stevedore Co*., 1 BRBS 123 (1974), the employee is no longer employed by the employer, *see Todd Shipyards Corp. v. Black*, 717 F.2d 1290, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), *aff'g* 13 BRBS 682 (1981), or if employer is granted relief under Section 8(f); Section 8(f) does not apply to Section 7 medical costs. *Barclift v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 418 (1983), *vac. and rem. on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107(CRT) (4th Cir. 1984); *Scott v. Rowe Mach. Works*, 9 BRBS 198 (1978); *Spencer v. Bethlehem Steel Corp*., 7 BRBS 675 (1978) (attendant care); *Duty v. Jet Am., Inc.*, 4 BRBS 523 (1976) (no dollar limit on employer's Section 7

liability). Rejecting employer's argument that Section 8(f) relief applies to medical expenses, the Board stated that the Special Fund may be held liable for medical expenses only under Section 44(j)(4) where the Secretary orders an independent medical examination or under Section 18(b) when employer defaults due to insolvency. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987).

Similarly, an award of medical expenses is independent of awards for or denial of Section 8 compensation or Section 9 death benefits, *Union Stevedoring Corp. v. Norton*, 98 F.2d 1012 (3d Cir. 1938), and medical expenses incurred during the three days following the injury must be paid notwithstanding that disability under Section 8 is not compensable during this time. 33 U.S.C. §906(a); *Ocean S.S. Co. of Savannah v. Lawson*, 68 F.2d 55 (5th Cir. 1933) (note that the non-compensable time was then seven days). Depending on the circumstances, physician's fees may be recovered from employer either as costs of litigation under Section 28(d) or as medical expenses under Section 7. *Gott v. Nat'l Steel & Shipbuilding Co*., 16 BRBS 188 (1984). *See Bradshaw v. J.A. McCarthy Inc.*, 3 BRBS 195 (1976), *pet. rev. denied mem.*, 547 F.2d 1161 (3d Cir. 1977), *vac. and rem.*, 433 U.S. 905, *pet. rev. denied mem.*, 564 F.2d 89 (3d Cir. 1977).

The definition of medical care includes laboratory, x-ray, and other technical services, prosthetic devices, and any other medical service or supply, including the reasonable and necessary cost of travel to obtain them, recognized as appropriate by the medical profession for the care and treatment of the injury or disease. 20 C.F.R. §702.401.

In *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984), the Board held that the fact that biofeedback therapy was prescribed by a treating physician, who found such treatment helpful, was sufficient to establish that the treatment was appropriate under 20 C.F.R. §702.401; claimant does not have the burden to show that treatment is medically accepted. Additionally, it was not necessary that the biofeedback therapist be licensed to administer such therapy. *Id*. at 303.

Costs incurred for transportation for medical purposes are recoverable under Section 7(a). *Day v. Ship Shape Maint. Co.*, 16 BRBS 38 (1983). A van with an automatic lift for a quadriplegic, while not "apparatus," is chargeable to his employer as a reasonable means to provide necessary transportation for medical purposes. *Id*. at 39. Parking fees and tolls incurred while traveling to or attending medical appointments may also be reimbursed. *Castagna v. Sears, Roebuck & Co*., 4 BRBS 559 (1976), *aff'd mem.*, 589 F.2d 1115 (D.C. Cir. 1978). The employee may be reimbursed for moving expenses if reasonable and based on his medical needs. *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981) (Kalaris, dissenting) (physician prescribed a move to a warmer climate to ease pain); *Gilliam v. W. Union Tel. Co.*, 8 BRBS 278 (1978) (first class airplane fare).

Medical expenses may also include an attendant, where such services are necessary because the employee is totally blind, has lost the use of both hands or both feet, is

paralyzed and unable to walk, or is otherwise so helpless as to require constant attendance. 20 C.F.R. §702.412(b). Fees for such an attendant are addressed by 20 C.F.R. §702.413.

Under Section 702.413 of the regulations, all fees charged by medical providers are limited to such charges for the same or similar care, including supplies, as prevails in the community in which the medical provider is located. *See Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515 (1978); *Potenza v. United Terminals, Inc.*, 1 BRBS 150 (1974), *aff'd,* 524 F.2d 1136, 3 BRBS 51 (2d Cir. 1975).

Where an employee's injuries are so severe as to require domestic services, the employer must provide them, even to the extent of reimbursing a family member who performs them. *Gilliam*, 8 BRBS at 279-280; *Timmons v. Jacksonville Shipyards, Inc.*, 2 BRBS 125 (1975) (wife as provider). In *Spencer*, 7 BRBS 675, the Board remanded the case for specific findings as to what attendant care is necessary and the reasonable value of such services. If the credited physician states claimant requires 24-hour care, employer is liable for it; family members are not free. *Carroll v. M. Cutter Co., Inc.*, 38 BRBS 53 (2004) (en banc) (Dolder, C.J., and Smith, J., dissenting), *aff'g* 37 BRBS 134 (2003) (Smith, J., concurring and dissenting), *aff'd,* 458 F.3d 991, 40 BRBS 53(CRT) (9th Cir. 2006).

Corrective lenses necessitated by a compensable injury are covered. *Fraley v. Todd Shipyards, Inc*., 4 BRBS 252 (1976), *vac. and rem. in part and rev'd in part on other grounds*, 592 F.2d 805, 10 BRBS 9 (5th Cir. 1979).

An employer is not liable for medical expenses due to the degenerative processes of aging. *Haynes v. Rederi A/S Aladdin*, 362 F.2d 345 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020 (1967). Neither does this subsection provide for reimbursement for expenses incidental to the employee's attending a hearing or for compensation for leave from work used to attend medical appointments. *Castagna*, 4 BRBS at 561.

Employer may be charged for medical appointments which its employee fails to either cancel or keep, as the charge is reasonable and necessary to compensate the physician for non-productive time, but only if the employee had a legitimate reason for neither attending nor cancelling. *Pernell*, 11 BRBS at 540.

The Fifth Circuit has held that since employer has a statutory responsibility to pay the reasonable cost of its employee's medical care, the government is entitled to reimbursement from the employer for any medical services provided to the employee by a Veterans Administration hospital. *United States v. Bender Welding & Mach. Co*., 558 F.2d 761 (5th Cir. 1977), *rev'g Simmons v. Bender Welding & Mach. Co*., 3 BRBS 222 (1976), and *Love v. Bender Welding & Mach. Co*., 3 BRBS 183 (1976). Similarly, the employer must reimburse any hospital association or other organization which has contracted with its employee to provide general medical care. *Contractors, Pac. Naval Air Bases v. Pillsbury,* 105 F. Supp. 772 (N.D. Cal. 1952); *see LaFortez v. I .T.O. Corp. of Baltimore*,

2 BRBS 102 (1975) (employer must pay entire bill if hospital charges flat rate, even if some treatment unrelated to injury).

An insurance carrier providing coverage for non-occupational injuries or illnesses may intervene to recover medical benefits erroneously paid for a work-related injury. *Aetna Life Ins. Co. v. Harris*, 578 F.2d 52 (3d Cir. 1978), *vacating and remanding Harris v. Sun Shipbuilding & Dry Dock Co*., 6 BRBS 494 (1977) (Washington, dissenting). In *Harris,* the court held that the question of Aetna's entitlement to reimbursement is a question in respect to a compensation claim under Section 19, as it is derived from the same nucleus of operative facts as the claim for compensation. The court reasoned that deciding reimbursement claims at the same time as compensation claims avoids essentially duplicative litigation thus reducing the expenditure of time and money by the parties and the courts. In a subsequent case, the Third Circuit held that the administrative law judge erred in denying Aetna's petition to intervene on remand. The court held that the administrative law judge erred in finding that Aetna could intervene only prior to the initial hearing. The court held that permitting intervention on remand served the policies of determining entitlement to reimbursement prior to the final award of benefits. *Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286, 14 BRBS 705 (3d Cir. 1982); *Grierson v. Marine Terminals Corp.*, 49 BRBS 27 (2015). *See also* Section 7(d)(3), *infra,* providing that the Secretary may, upon application of a party-in-interest, enter an award for the reasonable value of medical treatment obtained by the employee.

However, an employer is not liable to such third parties for medical services which are always *gratis, Bender Welding*, 558 F.2d at 764, and is not liable to claimant for expenses already paid by *employer's* non-occupational injury carrier to prevent double recovery. *Luker v. Ingalls Shipbuilding*, 3 BR6S 321 (1976). Distinguishing *Luker* as involving employer's insurer, the Board has held claimant may be reimbursed for sums paid by its private insurer as employer is absolutely liable for furnishing medical expenses for a work-related injury. *Turner v. New Orleans (Gulfwide) Stevedores*, 5 BRBS 418 (1977), *rev'd. and rem. on other grounds*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

If the employer defaults due to insolvency, the Secretary has the discretion to pay medical and other benefits from the Special Fund. 33 U.S.C. §918(b). *See Duty,* 4 BRBS at 530.

In a case of first impression, the Board affirmed the ALJ's denial of Claimant's request "for a finding that medical cannabis treatment is covered" under Section 7 of the Longshore Act. The Board held the ALJ correctly found marijuana remains a controlled substance under Schedule I of the Controlled Substance Act, 21 U.S.C. §801 *et seq*., and "has no currently accepted medical use in treatment in the United States" despite its legal status in Puerto Rico where Claimant lives. Stating it was proper for the ALJ to look exclusively to the CSA classification of marijuana in addressing the compensability of the treatment in this case arising under a federal workers' compensation program, the majority held the ALJ

rationally found marijuana cannot constitute "reasonable and necessary" treatment under Section 7(a) of the Act. *Peña Garcia v. Calzadilla Constr. Corp.*, 56 BRBS 7 (2022).

Digests

Related Expenses in General

The Board remanded the case to the administrative law judge for a determination of whether claimant's hearing loss is work-related; if so, claimant is entitled to medical benefits for a neck injury sustained during the course of a medical examination for the hearing loss. *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986).
Where relevant evidence establishes that claimant's psychological condition was caused, at least in part, by her work injury, and that she was treated, at least in part, for her work-related condition, claimant is entitled to benefits for this treatment. The Board also held that there is no evidence to support the administrative law judge's conclusion that the degree of claimant's pain is not sufficient to justify psychological services. The Board accordingly remanded for the administrative law judge to enter an award of medical benefits for those expenses deemed reasonable and necessary for treatment of claimant's psychological condition. *Kelley v. Bureau of Nat'l Affairs*, 20 BRBS 169 (1988).

The Board held that the administrative law judge erred in limiting employer's liability for medical expenses only to those incurred during the period of temporary total disability. In order for medical care to be compensable, it must be appropriate for the injury, and claimant must establish that the medical expenses are related to the injury. *See* 20 C.F.R. §702.402. Section 7 does not require that an injury be economically disabling in order for claimant to be entitled to medical expenses, but requires only that the injury be work-related. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988).

The Board affirmed the administrative law judge's denial of medical benefits based on his finding that claimant's surgery, a laminectomy, was unnecessary. The Board held, however, that employer is liable for compensation for disability following claimant's surgery. A physician's treatment of a work-related injury, even to the point of malpractice, does not break the causal nexus. Claimant's conduct in seeking treatment and his choice of physician were not unreasonable and neither his conduct nor the doctor's treatment severed the causal connection between claimant's primary injury and his employment. The Board remanded for the administrative law judge to determine the nature and extent of claimant's post-operative disability. *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

Board held that if on remand the administrative law judge determined that claimant's chronic pain syndrome was causally related to his employment, he must consider claimant's entitlement to medical benefits for the treatment rendered by Dr. Ng. An injury

need only be work-related in order for claimant to be entitled to medical benefits and need not be economically disabling. *Frye v. Potomac Elec. Power Co.*, 21 BRBS 194 (1988).

The Board affirmed the administrative law judge's finding that claimant's back problems were the natural and unavoidable result of his 1977 work injury, and claimant is therefore entitled to medical benefits, even though his claim for disability benefits was untimely. A claim for medical benefits is never time-barred. *Colburn v. Gen. Dynamics Corp.*, 21 BRBS 219 (1988).

As pleural plaques related to work exposure to asbestos establish a work-related condition, the Board vacated the administrative law judge's finding that claimant is not entitled to reimbursement for medical expenses for periodic monitoring of this lung condition. It is not necessary that a condition be disabling or result in impairment but only that claimant have a work-related harm. Moreover, as two qualified physicians stated that medical monitoring is necessary for this condition, claimant has established a *prima facie* case for compensable medical treatment. The case was remanded for findings as to whether the other requirements of Section 7 were met. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

The Board rejected employer's argument that it is not liable for medical services which claimant obtained without authorization and because they were necessitated by claimant's second accident. As the Board affirmed the administrative law judge's conclusion that claimant's disabling condition following the second incident was related to his work injury, employer is liable for medical treatment. Moreover, claimant was released from seeking authorization due to employer's refusal to provide treatment. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989).

A claimant is entitled to medical benefits for a work-related injury, in this case a psychological condition as well as a physical condition, even if that injury is not economically disabling. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

The Second Circuit reversed the administrative law judge's denial of medical benefits for claimant's psychiatric condition, as it reversed the administrative law judge's finding that the condition was not related to the work injury. The court held that the administrative law judge erred in failing to rely on the uncontradicted expert opinions of the physicians that claimant was experiencing an adjustment disorder and in substituting his judgment therefor by finding that claimant's symptoms are merely subjective. *Pietrunti v. Director OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

The Board vacated an administrative law judge's order for employer to pay "all reasonable and necessary medical expenses incurred to date and…such reasonable and necessary medical care and treatment, specifically, Dr. Roger Davis' pain clinic…as the claimant's

work-related injury…may require." While the administrative law judge has the authority to order payment for already incurred medical expenses and to generally order future medical treatment for a work-related injury, the administrative law judge erred in directing ongoing future treatment at the specified pain clinic. If authorization for such care is properly requested and the care is necessary and reasonable, employer may be liable for claimant's expenses at this clinic. However, ongoing treatment must be supervised by the district director as provided in the regulations. *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989).

The Board affirmed the administrative law judge's order directing employer to pay for claimant's work-related surgical fusion at C6-7, which it had denied, as the administrative law judge rationally found the procedure to be reasonable and necessary. The Board distinguished *McCurley*, 22 BRBS 115, on the grounds that claimant here requested authorization from employer for a single medical procedure, whereas in *McCurley*, the claimant sought ongoing, open-ended, non-specific treatment at a specific health care facility. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (1993).

The Board affirmed the denial of medical treatment as the administrative law judge rationally concluded that claimant's work-related back condition had resolved and that subsequent treatment was not for the work injury. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).

Two claimants who had no measurable hearing impairment under Section 8(c)(13) were denied disability benefits but were awarded medical benefits and a fee. The court rejected employer's argument that since claimants had no measurable impairment, they could not receive medical benefits. Nonetheless, the court reversed claimant Buckley's award of medical benefits, noting that there was no evidence of past expenses or of a need for future treatment; since the fee award was dependent on this award, it was also reversed. With regard to claimant Baker, the court remanded for findings regarding the necessity of medical treatment, noting that one doctor recommended annual evaluations and stated claimant was "a candidate for amplification" but another found that a hearing aid would not help him. The administrative law judge was also directed on remand to consider the amount of the fee in terms of claimant's limited success. *Ingalls Shipbuilding, Inc. v. Director, OWCP, [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

Inasmuch as claimant has a work-related hearing loss in his right ear, claimant is eligible for medical benefits under Section 7 even though claimant may have no measurable work-related impairment under the AMA *Guides*. In order to be entitled to medical benefits under Section 7, claimant must provide an adequate evidentiary basis sufficient to support the award such as past expenses incurred or evidence of necessary treatment in the future. In the instant case, the Board affirmed, as supported by substantial evidence, the

administrative law judge's determination that since the basis for recommending the hearing device is to compensate for the hearing loss of the left ear and that condition occurred as a result of an intervening cause wholly unrelated to any work-related hearing loss, employer could not be held liable for that proposed treatment. *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996).

The Board vacated the administrative law judge's denial of medical benefits and remanded the case to the administrative law judge to determine whether claimant is entitled to medical benefits for her work injury since there is evidence that may be sufficient to establish that she is undergoing treatment necessary for her work-related injury. Although the administrative law judge stated on reconsideration that there was no issue regarding medical benefits for him to decide because claimant presented no bills for payment, claimant's counsel asserted employer's responsibility for medical benefits and the administrative law judge should have addressed this issue. *Buckland v. Dep't of the Army/ NAF/CPO*, 32 BRBS 99 (1997).

In order to be entitled to medical benefits, a claimant need only establish he sustained a work-related injury. A claimant need not have a ratable impairment under the AMA *Guides*, as application of the *Guides* is limited to claims for disability benefits under Section 8. Claimant here sought only medical benefits for his non-ratable work-related hearing loss, and the Board affirmed the administrative law judge's determination that he is eligible for such benefits, if they are necessary for his injury. The Board distinguished this case from *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997), which is a FELA case. While active supervision of a claimant's medical care is performed by the Secretary of Labor and her delegates, the district directors, the Board reiterated that medical issues which involve factual disputes, as opposed to those which are purely discretionary, remain in the domain of the administrative law judge. In this case, the parties disputed claimant's entitlement to hearing aids and the administrative law judge erred in not addressing the issue but remanding the case for the district director to do so. The Board vacated the administrative law judge's order of remand, and remanded the case to him for a determination as to whether hearing aids are necessary and reasonable treatment for claimant's hearing loss, as such is a factual issues for the administrative law judge. The Board rejected employer's assertion that claimant's alleged non-compliance with state law affected his entitlement under the Act. *Weikert v. Universal Mar. Serv. Corp.*, 36 BRBS 38 (2002).

The First Circuit agreed with the Board's affirmance of the administrative law judge's general finding that claimant is entitled to medical benefits under Section 7(a), as the record established that claimant sustained an "injury" as defined by the Act. The parties, however, may litigate the propriety and reasonableness of any specific medical expenses. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

The Fifth Circuit affirmed the administrative law judge's finding that employer is liable for the cost of flu and pneumonia vaccines. The administrative law judge rationally relied on the opinion of claimant's doctor that patients with asbestosis require such vaccines to prevent chest infections and that asbestosis increases the likelihood that one will develop pneumonia and bronchitis. This evidence is adequate to support the conclusion that these respiratory ailments are a natural result of asbestosis and that flu and pneumonia vaccines are necessary treatments for the disease. *Ramsay Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015).

Where the parties stipulated to employer's liability for medical benefits/hearing aids, based on the opinions of two audiologists that claimant is a candidate for hearing aids, it was erroneous for the administrative law judge to deny all medical benefits based on his finding a lack of causation. Stipulations which are not contrary to law are binding on those who enter into them, and stipulations are offered in lieu of evidence and need not be established by the record evidence. The Board reversed the administrative law judge's denial of medical benefits. *Jones v. Huntington Ingalls, Inc.*, 51 BRBS 29 (2017), *rev'd on other grounds on recon.*, 55 BRBS 1 (2021), *aff'd* 70 F.4th 245, __ BRBS __(CRT) (5th Cir. 2023).

The Fifth Circuit affirmed the Board's determination on reconsideration that audiologists are among those defined as physicians under 20 C.F.R. §702.404. The Court determined while the statute is silent on the definition of "physician," audiologists should be considered physicians based on their "skill in the art of healing" as they engage in medical treatment for hearing loss, which comports with Webster's Third New International Dictionary's first definition of a physician as "a person skilled in the art of healing; one duly authorized to treat disease; a doctor of medicine, often distinguished from surgeon." The Fifth Circuit further used *Chevron* deference to the agency to determine the plan meaning of 20 C.F.R. §702.404 should include audiologists as physicians as they are analogous in licensing and practice as other examples included in the regulation. This decision overturns the previous decision in *Jones v. Huntington Ingalls Inc.*, 51 BRBS 29 (2017), where the Board held audiologists were not defined as physicians. *Huntington Ingalls, Inc. v. Jones*, 70 F.4th 245, __ BRBS __(CRT) (5th Cir. 2023).

In a case of first impression, the Board affirmed the ALJ's denial of Claimant's request "for a finding that medical cannabis treatment is covered" under Section 7 of the Longshore Act. The Board held the ALJ correctly found marijuana remains a controlled substance under Schedule I of the Controlled Substance Act, 21 U.S.C. §801 *et seq.*, and "has no currently accepted medical use in treatment in the United States" despite its legal status in Puerto Rico where Claimant lives. Stating it was proper for the ALJ to look exclusively to the CSA classification of marijuana in addressing the compensability of the treatment in this case arising under a federal workers' compensation program, the majority held the ALJ rationally found marijuana cannot constitute "reasonable and necessary" treatment under Section 7(a) of the Act. *Peña Garcia v. Calzadilla Constr. Corp.*, 56 BRBS 7 (2022).

Necessary Treatment and Reasonable Expenses/Distance

The Board remanded the case for the administrative law judge to address the proximity of a physician's office to claimant's residence in determining whether claimant was entitled to the services of Dr. LaRocca, a Board-certified orthopedic surgeon to whom claimant was referred by her treating physician, as Dr. LaRocca's practice is some 313 miles distant from claimant's home, employer offered the services of a nearby specialist and Section 702.403 provides that 25 miles is generally a reasonable travel distance for medical care. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

The Board affirmed the denial of medical benefits where the administrative law judge rationally found that the doctor's treatment was duplicative of the treatment claimant was receiving from other doctors and therefore was unnecessary. *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995).

The Board affirmed the administrative law judge's conclusion that treatment allegedly administered by Dr. Vogel was unreasonable and unnecessary as substantial evidence supported the findings that claimant saw Dr. Vogel with regard to an unrelated state court claim, the record contained no treatment records by Dr. Vogel or any indication that claimant went to Dr. Vogel for continued treatment of his work-related condition, and claimant was referred to Dr. Vogel by his attorney and not by any treating physician. The administrative law judge, moreover, rationally concluded that it was not reasonable for claimant to seek treatment with Dr. Vogel because of the considerable distance between claimant's residence in Houma, Louisiana, and Dr. Vogel's office, located in New Orleans, especially since other equally qualified physicians who were chosen by claimant, were in the Houma area. *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003).

Claimant is not afforded the benefit of a presumption of reasonableness of treatment under Section 7 by virtue of Section 20(a) of the Act. Although neither Section 7 of the Act nor the regulations explicitly assigns the burden of proof, claimant is not relieved of the burden of proving the elements of her claim for medical benefits. In determining the reasonableness of the costs of treatment claimant, a resident of Austin, Texas, procured at a pain center in Boston, the administrative law judge did not err by comparing the costs of the Boston treatment to that of similar treatment available in Houston, Texas. Although 20 C.F.R. §702.413 requires that a provider's fees are limited to prevailing community charges for similar care in the community in which the medical care is located, that regulation acts as a ceiling for compensable fees and does not preclude the administrative law judge from awarding a lesser amount where comparable less expensive treatment was available to claimant locally. While the proximity of the medical care to claimant's residence is a factor to be considered in determining the reasonableness of medical treatment, where competent care is available locally, claimant's medical expenses may reasonably be limited to those costs which would have been incurred had the treatment

been provided locally. In the instant case, the administrative law judge compared treatment available at a local pain center in Houston with the treatment procured by claimant in Boston, and, after considering the treatment available, the professional accreditations and success rates, and the experience of each clinic's director, rationally determined that adequate comparable treatment was available locally at a lesser cost. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

The Board affirmed the administrative law judge's finding that employer is not liable for the treatment provided by Dr. Raffai, as the administrative law judge rationally found that claimant's work-related back condition had resolved prior to the treatment, and it was within the administrative law judge's discretion to find that Dr. Raffai's treatment was not necessary for claimant's work-related back condition. *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd*, 32 F. App'x 126 (5th Cir. 2002).

The Ninth Circuit held that, although the employer is not required to pay for unreasonable and inappropriate treatment, when the patient is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to choose his own course of treatment. The administrative law judge may not find that the course chosen by claimant is unreasonable or unwarranted if no doctor states that the treatment is unnecessary or unreasonable. In this case, the administrative law judge credited employer's examining physician over claimant's treating physician. The court vacated the administrative law judge's finding that proposed surgery is not necessary, based on the examining physician's testimony, as the treating physician's opinion is entitled to greater weight, and as employer's physician acknowledged that surgery was a judgment call. *Amos v. Director, OWCP*, 153 F.3d 1051 (1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999).

The Board affirmed the administrative law judge's finding that when presented with two valid options for treatment, the decision should be left with the claimant to choose between them, and employer is liable for the option she chooses. Claimant's doctor recommended surgery, employer's doctor stated surgery was not necessary and would be malpractice, and an independent examiner did not recommend surgery but said many doctors would find surgery a viable option for claimant's condition. The administrative law judge noted the credentials of the physicians and rationally found that employer is liable for claimant's choice of treatment. *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005).

The administrative law judge has the authority to determine the necessity of medical care based on the evidence of record. The administrative law judge's finding that claimant is entitled to hearing aids for both ears is supported by substantial evidence. However, neither party is entitled, by statute or regulation, to choose which hearing aid is to be procured. The Board affirmed the administrative law judge's finding that the lower cost hearing aid was a reasonable and necessary treatment for claimant's binaural hearing loss, based on its cost and functionality, as it is supported by substantial evidence. *Green v. Ceres Marine*

Terminals, Inc., 43 BRBS 173 (2010), *rev'd on other grounds,* 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011).

Apparatus, Attendant Care and Similar Services

Where the administrative law judge found, based on a doctor's opinion, that claimant would be "better off" remaining with his family than being cared for in a nursing home, the Board rejected employer's argument that it should be liable only for the costs of nursing home care and affirmed the administrative law judge's decision holding employer responsible for paying for home health care services, as employer is liable for the costs of keeping claimant at home. The Board also affirmed the administrative law judge's conclusion that employer must reimburse claimant's wife for home health care services she paid for in excess of 8 hours per day because there is no evidence that the parties' informal agreement that employer was liable for only 8 hours of care per day was approved by a deputy commissioner or administrative law judge. *Falcone v. Gen. Dynamics Corp.,* 21 BRBS 145 (1988).

The Board affirmed the administrative law judge's finding that modifications to claimant's house necessitated by his disability, including ramps, widened doorways, handicapped-accessible plumbing fixtures, etc., are covered under Section 7. *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

The Board rejected the Director's contention that only the district directors, by delegation of the Secretary, have the authority to determine the appropriateness of medical care, in this case consisting of housekeeping assistance, under their authority to supervise medical care in Section 7(b) and 20 C.F.R. §702.412(b). The Board held that a claim for medical benefits that raises disputed factual issues such as the need for specific care or treatment for a work-related injury must be referred to an administrative law judge for resolution of the disputed factual issues in accordance with Section 19(d) of the Act and the APA. This interpretation is supported by the regulations at 20 C.F.R. §§702.315, 702.316. The Board distinguished its holding in *Toyer*, 28 BRBS 347, as that case involved solely a discretionary determination under Section 7(d)(2). *Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997)(Brown, J., concurring).

Where claimant was severely injured in a work accident and all medical personnel who evaluated him recommended 24-hour supervision for his safety, the Board held that the administrative law judge erred in holding employer liable for less than 24 hours of paid care per day. The Board held that, while claimant was not in need of 24 hours of paid *professional* care each day, the recommendation required that employer pay claimant's family, albeit at a reduced rate, for their time in caring for claimant for the remainder of the 24 hours each day; the administrative law judge should not have required them to care for claimant for free. Thus, as it was uncontradicted that claimant needs 24 hours of care each day, the Board held employer liable for such care. Employer's liability commences

after the request for such care was made and not merely upon claimant's discharge from the hospital. *Carroll v. M. Cutter Co., Inc.*, 37 BRBS 134 (2003) (Smith, J., concurring and dissenting), *aff'd on recon. en banc*, 38 BRBS 53 (2004) (Dolder, C.J., and Smith, J., dissenting), *aff'd*, 458 F.3d 991, 40 BRBS 53(CRT) (9th Cir. 2006).

On reconsideration en banc, the Board affirmed its decision that the issue before it was a legal issue and that the administrative law judge erred in disregarding the undisputed evidence that claimant is in need of 24 hours of supervision per day. Because the evidence is undisputed and because Section 7(a) mandates that employer's liability for medical care is to be based on the care necessitated by the injury, the Board held that employer is liable for 24 hours per day of attendant care. *Carroll v. M. Cutter Co., Inc.*, 38 BRBS 53 (2004) (en banc) (Dolder, C.J., and Smith, J., dissenting), *aff'g* 37 BRBS 134 (2003) (Smith, J., concurring and dissenting), *aff'd*, 458 F.3d 991, 40 BRBS 53(CRT) (9th Cir. 2006).

The Ninth Circuit affirmed the Board's interpretation of Section 7(a), which bases employer's liability for attendant care exclusively on a determination of the care required by the injury. Thus, the court affirmed the Board's holding as a matter of law that where it is undisputed that claimant needs 24-hour attendant care, Section 7(a) expressly mandates that employer is liable for that required care. *M. Cutter Co., Inc. v. Carroll*, 458 F.3d 991, 40 BRBS 53(CRT) (9th Cir. 2006).

The Board affirmed the award of medical benefits as substantial evidence supported the administrative law judge's finding that the additional open MRI testing, back surgery and orthopedic supplies, consisting of a cane and back support, were recommended by the physicians of record and therefore necessary for the treatment of claimant's work-related back injury. *J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010).

Employer provided claimant, a bi-lateral amputee, with a wheelchair-accessible addition to his parents' home where he resided at the time of his work injury. Nine years later, claimant moved for reasons unrelated to the work injury and requested that employer appropriately modify his new home. The administrative law judge ordered employer to provide home modifications, but allowed it to take a credit for the cost of the modifications to claimant's prior home. The Board reversed the administrative law judge's award of a credit for these previously paid medical benefits. There are no statutory or extra-statutory bases to allow a credit. The administrative law judge found no evidence that claimant moved in order to impose on employer liability for the additional expense or based on a personal preference to live elsewhere. Rather, he found claimant had to move for reasons largely beyond his control. *Teer v. Huntington Ingalls, Inc.*, 53 BRBS 5 (2019).

Employer's Liability for Reimbursement of Intervenors

The right to reimbursement of medical costs to a carrier providing non-occupational disease coverage (an intervenor) for a condition ultimately determined to be occupationally-related, is solely derivative of claimant's right to reimbursement of such expenses under Section 7. Section 7 provides the exclusive means of holding employer liable for medical benefits and contains no provisions granting non-occupational carriers an independent right to reimbursement. As claimant did not comply with the requirements of Section 7(d), the administrative law judge's finding that the intervenor could not be reimbursed was affirmed *Ozene v. Crescent Wharf & Warehouse Co.*, 19 BRBS 9 (1986).

Claimant has no standing to assert Medi-Cal's rights to reimbursement for medical services it provided to claimant. *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986), *modified on recon.*, 19 BRBS 52 (1986). On reconsideration, the Board modified this decision, holding that the administrative law judge erred in not allowing Medi-Cal to intervene to obtain reimbursement of medical expenses. An insurance carrier providing coverage for non-occupational injuries can intervene and recover amounts mistakenly paid for injuries determined to be work-related where claimant is entitled to such expenses. The Board remanded the case to the administrative law judge for a determination as to who should reimburse Medi-Cal. If employer has not yet paid claimant, employer must reimburse Medi-Cal, but if employer has paid claimant, claimant will reimburse Medi-Cal. *Quintana v. Crescent Wharf & Warehouse Co.*, 19 BRBS 52 (1986), *modifying on recon.* 18 BRBS 254 (1986).

The Board rejected claimant's argument that employer owes him for medical bills paid by his private insurers and the state of California for bills paid by Medi-Cal. Claimant may only recover amounts which he himself expended for medical treatment. *Nooner v. Nat'l Steel & Shipbuilding Co.*, 19 BRBS 43 (1986).

The Board held that employer's one-sentence "argument" regarding its liability for medical bills paid by a private insurer, which cited a single authority, does not constitute adequate briefing of an issue raised on appeal, as the Board would have to extrapolate the argument and conclusion therefrom. Therefore, the Board held on reconsideration en banc that the panel properly declined to address the issue in its decision. However, for the sake of clarification, the Board stated that employer is liable to claimant for all medical expenses related to the injury paid by claimant and is liable for all medical expenses related to the injury paid by claimant's private health insurer, provided the private insurer files a request for reimbursement of same. *Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997).

The Board held that the administrative law judge erred in concluding that, in general, medical expenses are not properly the subject of a Section 3(e) credit, but the error was harmless because the administrative law judge correctly recognized that the state's right to

reimbursement for claimant's medical expenses is contingent upon claimant's right to medical benefits under the Longshore Act. The State of Washington is entitled to reimbursement from employer for claimant's medical benefits only if the administrative law judge finds on remand that claimant is entitled to medical benefits under the Act. *McDougall v. E. P. Paup Co.*, 21 BRBS 204 (1988), *aff'd and modified sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

The Board held that ILWU-PMA's Section 17 lien on disability benefits paid to claimants and claim for reimbursement of medical expenses paid must be resolved simultaneously with the settlement agreements entered into by claimants and their employers. As ILWU-PMA intervened in these cases, it is "a party to any claim" pursuant to Section 8(i), and claimants and employers cannot settle claimants' claims under Section 8(i) without ILWU-PMA's explicit involvement. Thus, the Board vacated the settlement agreements and remanded the cases for any action necessary to resolve claimants' claims and ILWU-PMA's lien and medical reimbursement claims. Section 17 and its implementing regulation, 20 C.F.R. §702.162, establish that ILWU-PMA's Section 17 lien is limited to amounts it paid to the claimants for *disability* covered by the Act. Thus, ILWU-PMA's right to recoup the medical expenses it paid on behalf of the claimants is outside the scope of its Section 17 lien. Any right to reimbursement of medical benefits that ILWU-PMA possesses comes within Section 7 of the Act and is derivative of claimants' rights to medical benefits, although, pursuant to Section 7(d)(3), ILWU-PMA may seek an award for the benefits it paid on claimant's behalf. *M.K. [Kellstrom] v. California United Terminals*, 43 BRBS 1, *aff'd on recon.*, 43 BRBS 115 (2009).

On reconsideration, the Board reiterates that since ILWU-PMA's claims for reimbursement of medical benefits are derivative of claimants' claims for medical benefits, ILWU-PMA's claims must be resolved simultaneously with claimants' claims. If employers and claimants were permitted to settle the claim for medical benefits without ILWU-PMA's participation, employers' liability for medical benefits would be extinguished and the Plan would be without recourse. Thus, the Board properly held that since the settlements in these cases infringe on ILWU-PMA's derivative right to reimbursement of medical benefits, they must be vacated. *M.K. [Kellstrom] v. California United Terminals*, 43 BRBS 115, *aff'g on recon.* 43 BRBS 1 (2009).

At the Director's urging, the Board clarified its holding to reflect that only those parties with a financial interest in the claim must have their rights resolved simultaneously with the rights of the other parties whose financial interests are also at stake. In these cases, ILWU-PMA has, via its valid Section 17 liens, a financial interest in the disability aspect of the settlements in these cases. As for medical benefits, ILWU-PMA's financial interests, premised on its Section 7(d)(3) reimbursement claims, arose because the settlement agreements included releases for past medical benefits. Thus, the Board reiterated that claimants and employers cannot settle claimants' disability and past medical benefits claims without ILWU-PMA's agreement. The Board stated, however, that the parties

could settle any claims for future medical benefits without the Plan's participation as it has no financial interest in such claims. *M.K. [Kellstrom] v. California United Terminals*, 43 BRBS 115, *aff'g on recon.* 43 BRBS 1 (2009).

Sections 7(b), (c) - Choice of Physician and Physician Defined

Section 7(b) of the Act provides that the "employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this Act as hereinafter provided." 33 U.S.C. §907(b). The section further provides that where the employee cannot make his choice due to the nature of his injury and the injury requires immediate treatment, the employer shall select a physician for him.

Section 7(b) also states the responsibilities of the Secretary, whose authority is delegated to the district directors, to oversee medical care, providing that she shall actively supervise the medical care provided, require periodic reports regarding such care, and determine the necessity, character, and sufficiency of present and future medical care. Under the 1972 Act, the Secretary was authorized to order a change of physicians or hospitals on her own initiative or at the request of the employer if she deems it desirable or necessary in the interest of the employee. The 1984 Amendments retained this language and added to it that the Secretary may also order such a change where the charges exceed those prevailing in the community for the same or similar services or exceed the provider's customary charges. The subsection concludes by stating that change of physicians at the request of the employee shall be permitted in accordance with the regulations. *See* 20 C.F.R. §702.401 *et seq.*

Section 702.403 provides that the employee has the right to choose an attending physician from among those authorized by the Director but may not choose a physician on the list of those debarred. In determining the choice of physician, consideration must be given to availability, the employee's condition and transportation. In general, 25 miles from the place of injury or the employee's home is a reasonable travel distance, but other pertinent factors should be considered. *See* cases digested, *supra*, regarding reasonable care and distance.

Where the employer has selected a physician in an emergency situation, the employee may change physicians when he is able to make a selection. The change shall be made upon obtaining written authorization from the employer, or, if employer withholds consent, from the district director. 20 C.F.R. §702.405. The Act contemplates severe injury, unconsciousness, or similar incapacity in order for employer to select a physician due to the necessity for immediate treatment. *Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515 (1978).

Under the 1972 Act, the procedures to be followed by a claimant who wished to change his physician after making his initial free choice pursuant to Section 7(b) were provided only by the regulations, 20 C.F.R. §702.406. The 1984 Amendments incorporated the regulatory language of Section 702.402 into Section 7(c)(2) of the Act. Section 7(c)(2) provides that when the employer or carrier learns of its employee's injury, either through written notice or as otherwise provided by the Act, it must authorize medical treatment by

the employee's chosen physician. Once claimant has made his initial free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier or deputy commissioner (district director). 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406. Such consent shall be given when the employee's initial free choice was not of a specialist whose services are necessary for, and appropriate to, proper care and treatment. Consent may be given in other cases upon a showing of good cause for change. *Id. See Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44(CRT) (D.C. Cir. 1984); *Swain v. Bath Iron Works Corp*., 14 BRBS 657 (1982). The regulation contains the same language at Section 702.406(a). Section 702.406(b) provides that the district director may order a change of physician where such is necessary or desirable or where the fees charged exceed the prevailing community charges.

Employer is generally not responsible for the payment of medical benefits if claimant fails to seek the required authorization. *Lloyd*, 725 F.2d at 787, 16 BRBS at 53(CRT); *Swain*, 14 BRBS at 664. *See* 33 U.S.C. §907(d). However, failure to obtain authorization for a change can be excused where claimant has been effectively refused further medical treatment. *Washington v. Cooper Stevedoring Co.*, 3 BRBS 474 (1976), *aff'd*, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977); *Buckhaults v. Shippers Stevedore Co*., 2 BRBS 277 (1975). *See Lloyd*, 725 F.2d at 786, 16 BRBS at 53(CRT). *See* Refusal of Treatment at Section 7(d).

Active supervision of the injured employee's medical care is the responsibility of the Director, OWCP, through the district directors and their designees. 20 C.F.R. §702.407. *See Roulst v. Marco Constr. Co.*, 15 BRBS 443 (1983) (deputy commissioner may order a change of physicians under Section 7(b)).

The 1972 version of Section 7(c) provided for the Secretary to designate physicians who were authorized to render medical care under the Act and required that the names of the authorized physicians in their communities be available to employees. This subsection was amended in 1984, and it now requires that the Secretary annually prepare a list of physicians and health care providers in each compensation district who are *not* authorized to render medical care or services under the Act and to make this list available to employees and employers in each compensation district. 33 U.S.C. §907(c)(1)(A)**.** Under Section 7(c)(1)(C), medical services provided by physicians or health care providers who are on the list published pursuant to Section 7(c)(l) shall not be reimbursable except in emergency situations. It is employer's burden to establish that physicians providing treatment were not authorized. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986).

Section 7(c)(1)(B) provides five specific grounds for the Secretary to place physicians and health care providers on the list of those not authorized to provide services, in accordance with the procedures in Section 7(j). *See* 20 C.F.R. §§702.431-436. Under Section 7(c)(1)(D), a determination under subparagraph (B) remains in effect for not less than 3

years and until the Secretary determines that the basis for the determination will not recur. Section 7(c)(1)(E) states that all providers of services, appliances or supplies must provide the Secretary such information and certification as the Secretary requires to enforce this provision.

The employer must respond to a request for treatment upon learning of the injury even if it is uncertain as to whether it was work-related. *Rieche v. Tracor Marine, Inc.*, 16 BRBS 272 (1984). The employee is similarly required to request authorization for treatment even if he is unaware of the work-relatedness of his illness. *Mattox v. Sun Shipbuilding & Dry Dock Co*., 15 BRBS 162 (1982) (Miller, J., dissenting).

The term "physician" includes doctors of medicine, surgeons, podiatrists, dentists, clinical psychologists, optometrists, osteopaths, and chiropractors, within the scope of their practice as defined by state law. Chiropractic treatment, however, is reimbursable only to the extent that it consists of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings. Physicians may interpret their own x-rays. Naturopaths, faith healers, and other unlisted practitioners of the healing arts are not physicians. 20 C.F.R. §702.404. *But see* Section 7(k), added by the 1984 Amendments (allowing spiritual treatment).

Chiropractors need not be paid for treatment rendered before October 11, 1977, as only then was the regulation amended to allow payments to them. *Blanchard v. Gen. Dynamics Corp*., 10 BRBS 69 (1979) (Miller, J., dissenting). A pastoral counselor must document his credentials to show whether he is a physician within the meaning of the regulation or qualified to perform "other" compensable treatment under Section 7(a). *Turner v. Chesapeake & Potomac Tel. Co*., 16 BRBS 255 (1984).

Digests

Definition of Physician

The Board reversed the administrative law judge's award of medical benefits for biofeedback treatment and physical therapy prescribed by claimant's treating chiropractor as claimant had not been diagnosed with a subluxation of the spine. Under the plain language of 20 C.F.R. §702.404, a chiropractor's reimbursable services are limited to treatment consisting of manual spinal manipulation to correct a subluxation shown by x-ray or clinical findings. *Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183 (1998).

The Board reversed the administrative law judge's denial of medical benefits, holding that claimant's massage therapy, prescribed by his treating physician, a chiropractor, for treatment of a subluxation and performed by a massage therapist in the chiropractor's office, is compensable. The Board held that the administrative law judge erred in creating an "integral to and inseparable from" the manual manipulation and/or "safety" test for

determining whether the massage therapy was compensable, particularly after having found the therapy was reasonable and necessary treatment for claimant's subluxation. Moreover, the decision in *Bang*, 32 BRBS 183, is not applicable as the claimant therein did not have a subluxation. The Board stated that while Section 702.404 defines when a chiropractor is considered a "physician" under the Act, Section 7(a) of the Act and Section 702.401(a) of the regulations define which medical care performed by a non-physician is compensable. As the care rendered by Ms. Oliver, a non-physician, was prescribed by claimant's treating physician for treatment of his work-related subluxation, and as the administrative law judge found the therapy to be reasonable and necessary, the massage therapy is compensable. *R.C. [Carter] v. Caleb Brett, L.L.C.*, 43 BRBS 75 (2009).

The Board reversed the administrative law judge's finding that employer is not liable for hot packs, electrical muscle stimulation and intersegmental traction performed by claimant's chiropractor. The uncontradicted evidence establishes that these services were reasonable, necessary and integral to the manual manipulation of claimant's spine in order to treat his diagnosed subluxation. The decision in *Bang*, 32 BRBS 183, is not applicable as the claimant therein did not have a subluxation. *N.T. [Thompson] v. Newport News Shipbuilding & Dry Dock Co.*, 43 BRBS 71 (2009).

The Board held that claimants do not have a statutory right to select their own pharmacy or provider of prescriptions, as pharmacies are not included in the definition of "physician" contained in 20 C.F.R. §702.404, and thus are not encompassed within Section 7(b)'s right to choose a physician. *Potter, et al. v. Elec. Boat Corp.*, 41 BRBS 69 (2007).

In this hearing loss case, claimant was examined by an audiologist of his choice, as well as an audiologist selected by employer. Both recommended hearing aids. In agreeing to pay for claimant's hearing aids, employer authorized claimant to get his hearing aids from a third audiologist, one nearer to his home. The Board rejected claimant's assertions that he has a statutory or regulatory right to his choice of audiologist and the case should be remanded for the administrative law judge to address whether claimant's choice is reasonable. Rather, relying on *Potter v. Elec. Boat Corp.*, 41 BRBS 69 (2007), the Board held that audiologists are not among those defined as "physicians" under 20 C.F.R. §702.404, and, as the selection of an audiologist who will dispense hearing aids falls within the "character and sufficiency" of medical care, the issue concerning the selection of an audiologist is delegated to the district director. Accordingly, the Board remanded the case to the district director to address the details of claimant's audiological care. *Jones v. Huntington Ingalls, Inc.*, 51 BRBS 29 (2017), *rev'd in pertinent part on recon.*, 55 BRBS 1 (2021), *aff'd* 70 F.4th 245, __ BRBS __(CRT) (5th Cir. 2023).

The Fifth Circuit affirmed the Board's determination on reconsideration that audiologists are among those defined as physicians under 20 C.F.R. §702.404. The Court determined while the statute is silent on the definition of "physician," audiologists should be considered physicians based on their "skill in the art of healing" as they engage in medical

treatment for hearing loss, which comports with Webster's Third New International Dictionary's first definition of a physician as "a person skilled in the art of healing; one duly authorized to treat disease; a doctor of medicine, often distinguished from surgeon." The Fifth Circuit further used *Chevron* deference to the agency to determine the plan meaning of 20 C.F.R. §702.404 should include audiologists as physicians as they are analogous in licensing and practice as other examples included in the regulation. This decision overturns the previous decision in *Jones v. Huntington Ingalls Inc.*, 51 BRBS 29 (2017), where the Board held audiologists were not defined as physicians. *Huntington Ingalls, Inc. v. Jones*, 70 F.4th 245, __ BRBS __(CRT) (5th Cir. 2023).

In this case, two ALJs separately found Claimant does not have the right to choose her own physical therapist or PT facility under the Act. Section 7(b) provides claimants with the right to choose an attending physician, and 20 C.F.R. §702.404, defines "physician." The Board agreed with the ALJs, stated "[t]he statute is silent as to the definition of 'physician,' and the regulation does not list physical therapists as being considered physicians[,]" and held the Act does not give Claimant the choice of selecting her own physical therapist or PT facility. *Jefferson v. Marine Terminals Corp.*, 55 BRBS 21 (2021).

Choice/Change of Physician

An employer was not required to consent to a change of physicians where claimant, who sustained a pulmonary injury and initially chose to see a physician who was not a pulmonary specialist, later decided to undergo treatment from a pulmonary specialist, because the initial physician sent claimant to other specialists skilled in treating pulmonary injuries, and thus the initial physician provided the care of a specialist whose services are necessary for the proper care and treatment of the compensable injury pursuant to Section 7(b) and 20 C.F.R. §702.406(a). *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988).

Section 7(b) and its accompanying regulation, 20 C.F.R. §702.407, address the authority of the Secretary and the deputy commissioners to oversee an injured employee's medical care. The provisions, do not, however, address the issue of payment or reimbursement, which is governed by Section 7(d). Thus, where employer refuses to authorize a change in physician, claimant is entitled to reimbursement under Section 7(d) if the treatment subsequently procured on his own initiative is found to be necessary. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

The Board vacated an administrative law judge's order for employer to pay "all reasonable and necessary medical expenses incurred to date and…such reasonable and necessary medical care and treatment, specifically, Dr. Roger Davis' pain clinic…as the claimant's work-related injury…may require." While the administrative law judge has the authority to order payment for already incurred medical expenses and to generally order future medical treatment for a work-related injury, the administrative law judge erred in directing ongoing future treatment at the specified pain clinic. If authorization for such care is

properly requested and the care is necessary and reasonable, employer may be liable for claimant's expenses at this clinic. However, ongoing treatment must be supervised by the district director as provided in the regulations. The Board held that the administrative law judge's actions violated Section 7(b) of the Act and Sections 702.406 and 702.407 of the regulations, which authorize the Secretary and his designee, the deputy commissioner (district director), to oversee the provision of health care. *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989).

The Board held that where the employer authorized treatment for claimant's initial physician, who subsequently retired and turned his practice over to another physician, claimant need not seek authorization for treatment with the new physician. Moreover, there is no authority for requiring separate authorization for each medical treatment. *Maguire v. Todd Pac. Shipyards Corp.*, 25 BRBS 299 (1992).

The Board held that where claimant's treating physician became unavailable due to his leaving private practice, claimant was not required to obtain approval from employer or the district director before treating with a new physician of his choosing. Good cause for the change is established under these facts, pursuant to 20 C.F.R. §702.406(a). *Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (2005).

The Board affirmed the administrative law judge's finding that claimant did not need to seek authorization for a change in physician where the initial physician referred claimant to the appropriate specialist. *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992) (R. Smith, J., dissenting on other grounds).

The Board rejected claimant's contention that she was not permitted to select her own physician because the nature of her injury required that employer immediately select one for her. Section 7(b) and 20 C.F.R. §702.405, permitting employer to select a physician, contemplate severe injuries such as unconsciousness or other incapacity preventing claimant from making a selection. In this case claimant was not so incapacitated; employer suggested a doctor when claimant's initial choice was unavailable and claimant treated with this doctor for two years. Thus, he was her initial free choice. Moreover, employer was not required to consent to a change in physician as employer did not refuse to authorize continuing treatment from this doctor. *Hunt v. Newport News Shipbuilding & Dry Dock Co.*, 28 BRBS 364 (1994), *aff'd mem.*, 61 F.3d 900 (4th Cir. 1995).

The Board rejected the Director's contention that only the district directors, by delegation of the Secretary, have the authority to determine the appropriateness of medical care, in this case consisting of housekeeping assistance, under their authority to supervise medical care in Section 7(b) and 20 C.F.R. §702.412(b). The Board held that a claim for medical benefits that raises disputed factual issues such as the need for specific care or treatment for a work-related injury must be referred to an administrative law judge for resolution of the disputed factual issues in accordance with Section 19(d) of the Act and the APA. This

interpretation is supported by the regulations at 20 C.F.R. §§702.315, 702.316. The Board distinguished its holding in *Toyer*, 28 BRBS 347, as that case involved solely a discretionary determination under Section 7(d)(2). *Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997)(Brown, J., concurring).

The Board held that pursuant to Section 7(b) and Sections 702.406(b) and 702.407(b), (c), only the district director, and not the administrative law judge, has the authority to change claimant's treating physician at the request of employer, if the district director determines that such change is necessary or desirable in the interest of the employee. The Board held that the language of the statute is discretionary, as in *Toyer*, 28 BRBS 347, and therefore there is no role for the administrative law judge to play in this determination. The Board distinguished *Sanders*, 31 BRBS 19. In this case, however, the district director failed to sufficiently explain his reasons for granting employer's request and changing claimant's physician; therefore, the Board vacated the decision and remanded the case to the district director for further consideration. *Jackson v. Universal Mar. Serv. Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring).

While active supervision of a claimant's medical care is performed by the Secretary of Labor and her delegates, the district directors, the Board reiterated that there are some medical issues which remain in the domain of the administrative law judge: specifically, those issues which involve factual disputes as opposed to those which are purely discretionary. In this case, the parties disputed claimant's entitlement to hearing aids for his non-ratable work-related hearing loss; however, the administrative law judge did not address the issue but instead remanded the case for the district director to do so. The Board vacated the administrative law judge's order of remand, and remanded the case to the administrative law judge for resolution of whether hearing aids are necessary and reasonable treatment for claimant's hearing loss, as such are factual issues for the administrative law judge. *Weikert v. Universal Mar. Serv. Corp.*, 36 BRBS 38 (2002).

The Board held that while claimant had good cause to choose a new treating physician, and thus employer's consent was not required, the district director had the authority to address employer's objection to claimant's choice of physician on the ground that he was not a specialist in treating spinal injuries. Inasmuch as the claims examiner's conclusion that claimant's chosen physician is not a spine specialist raised a disputed question of fact, the administrative law judge had the authority to make findings on this issue. The administrative law judge's decision, however, must be based on the evidence of record. The administrative law judge purported to rely on the "testimony" of claimant's counsel at the hearing to find that claimant's chosen physician treats spinal injuries. Claimant's counsel was a not a witness, and his statements at the hearing or in briefs are not part of the evidentiary record. The Board therefore vacated the administrative law judge's finding that claimant's chosen physician was an appropriate spine specialist as it was not supported by substantial evidence. As claimant had ample opportunity to put in evidence on this issue, the Board declined to remand the case to the administrative law judge to allow

claimant an additional opportunity but remanded it to the district director to issue an order addressing and resolving the parties' contentions regarding claimant's chosen physician consistent with the Act and regulations governing medical issues. *Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (2005).

The Board held that claimants do not have a statutory right to select their own pharmacy or provider of prescriptions, as pharmacies are not included in the definition of "physician" contained in 20 C.F.R. §702.404, and thus are not encompassed within Section 7(b)'s right to choose a physician. Pursuant to 20 C.F.R. §702.407(b), the district director, and not the administrative law judge, has the authority to address the choice of pharmacy issue raised by the parties, as the district director supervises the medical care of injured employees. The parties did not raise any factual issues requiring adjudication by an administrative law judge. *Potter, et al. v. Elec. Boat Corp.*, 41 BRBS 69 (2007).

In this hearing loss case, claimant was examined by an audiologist of his choice, as well as an audiologist selected by employer. Both recommended hearing aids. In agreeing to pay for claimant's hearing aids, employer authorized claimant to get his hearing aids from a third audiologist, one nearer to his home. The Board rejected claimant's assertions that he has a statutory or regulatory right to his choice of audiologist and the case should be remanded for the administrative law judge to address whether claimant's choice is reasonable. Rather, relying on *Potter v. Electric Boat Corp.*, 41 BRBS 69 (2007), the Board held that audiologists are not among those defined as "physicians" under 20 C.F.R. §702.404, and, as the selection of an audiologist who will dispense hearing aids falls within the "character and sufficiency" of medical care, the issue concerning the selection of an audiologist is delegated to the district director. Accordingly, the Board remanded the case to the district director to address the details of claimant's audiological care. *Jones v. Huntington Ingalls, Inc.*, 51 BRBS 29 (2017), *rev'd in pertinent part on recon.*, 55 BRBS 1 (2021), *aff'd* 70 F.4th 245, __ BRBS __(CRT) (5th Cir. 2023).

On reconsideration, a majority of the Board held Claimant has a right to choose his treating audiologist and reversed the Board's prior decision to the contrary, 51 BRBS 29. The Board, after a detailed discussion of the statute, regulation, and Congressional intent, relied on the language in Section 8(c)(13)(C) of the Act, equating certain skills of an audiologist to that of an otolaryngologist, to conclude audiologists are "physicians" under the Act, thereby entitling claimants to their first choice of physician to treat their hearing loss. *Jones v. Huntington Ingalls, Inc.*, 55 BRBS 1 (2021) (on recon), *aff'd* 70 F.4th 245, __ BRBS __(CRT) (5th Cir. 2023).

The Fifth Circuit affirmed the Board's determination on reconsideration that audiologists are among those defined as physicians under 20 C.F.R. §702.404. The Court determined while the statute is silent on the definition of "physician," audiologists should be considered physicians based on their "skill in the art of healing" as they engage in medical

treatment for hearing loss, which comports with Webster's Third New International Dictionary's first definition of a physician as "a person skilled in the art of healing; one duly authorized to treat disease; a doctor of medicine, often distinguished from surgeon." The Fifth Circuit further used *Chevron* deference to the agency to determine the plan meaning of 20 C.F.R. §702.404 should include audiologists as physicians as they are analogous in licensing and practice as other examples included in the regulation. This decision overturns the previous decision in *Jones v. Huntington Ingalls Inc.*, 51 BRBS 29 (2017), where the Board held audiologists were not defined as physicians. *Huntington Ingalls, Inc. v. Jones*, 70 F.4th 245, __ BRBS __(CRT) (5th Cir. 2023).

The Board held that where a claimant sustains a second work-related injury, she is entitled to a new choice of attending physician pursuant to Section 7(b) for reasonable and necessary treatment resulting from the new injury; the selection of a new attending physician for the new injury does not constitute a request for a change in physician pursuant to Section 7(c)(2). *L.W. [Washington] v. Northrop Grumman Ship Sys.*, 43 BRBS 27 (2009).

In this case, two ALJs separately found Claimant does not have the right to choose her own physical therapist or PT facility under the Act. Section 7(b) provides claimants with the right to choose an attending physician, and 20 C.F.R. §702.404, defines "physician." The Board agreed with the ALJs, stated "[t]he statute is silent as to the definition of 'physician,' and the regulation does not list physical therapists as being considered physicians[,]" and held the Act does not give Claimant the choice of selecting her own physical therapist or PT facility. *Jefferson v. Marine Terminals Corp.*, 55 BRBS 21 (2021).

Section 7(d)

Authorization and Refusal to Provide Treatment

Section 7(d)(l) provides requirements which must be met in order for employer to be held liable for medical treatment. The statute as amended in 1984 states:

> An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless—
>
> > (A) the employer shall have refused or neglected a request to furnish such services and the employee has complied with subsections (b) and (c) and the applicable regulations; or
> > (B) the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize same.

33 U.S.C. §907(d)(1).

The pre-1984 provision was similar, providing that an employee could not be reimbursed unless he requested that employer furnish treatment or services or to authorize treatment by the employee's selected physician and employer refused or neglected to do so, or, if treatment was required for an injury, employer, having knowledge of the injury, refused or neglected to provide treatment. 33 U.S.C. §907(d)(1982)(amended 1984).

Thus, an employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, except in cases of emergency or refusal/neglect. 20 C.F.R. §702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (per curiam), *cert. denied*, 459 U.S. 1146 (1983); *McQuillen v. Horne Brothers, Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div. Litton Sys., Inc.*, 15 BRBS 299 (1983) (Miller, dissenting). The Fourth Circuit reversed a Board decision holding that a request to employer for authorization before seeking treatment is necessary only where claimant is seeking reimbursement for medical expenses already paid; the court held that the prior request requirement applies at all times. *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977). *See also Nardella v. Campbell Mach., Inc.*, 525 F.2d 45, 3 BRBS 78 (9th Cir. 1975) (claimant substantially complied with Section 7(d) with regard to Dr. Brandon by advising employer's agent that he was going to seek a doctor's treatment and delivering a note from the doctor to employer thereafter, but as he did not request authorization for treatment with other medical providers he subsequently obtained, he is not entitled to payment of those expenses).

An employee's right to his initial free choice of physician pursuant to subsection (b) does not negate the requirement that he request authorization. *Shahady v. Atlas Tile & Marble Co.*, 13 BRBS 1007 (1981) (Miller, dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). In holding that claimant must request authorization even of his initial free choice of physician in *Shahady*, the Board acknowledged that its decision in *Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515 (1978), contained contrary language and overruled *Bulone* to the extent it was inconsistent. *Accord Beynum v. Washington Metro. Area Transit Auth.*, 14 BRBS 956 (1982); *Betz v. Arthur Snowden Co.*, 14 BRBS 805 (1981) (prior request requirement applies to treatment rendered by claimant's first physician of choice). Additionally, the Section 7(d) requirement of prior request is not excused because claimant is not aware that his illness is work-related at the time he seeks treatment. *Mattox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982) (Miller, J., dissenting). Before an employer can be said to have neglected to provide care, there must first have been a request for such care. *Jackson v. Navy Exch. Serv. Ctr.*, 9 BRBS 437 (1978).

Where a claimant first saw a doctor for evaluation purposes, then selected another physician and requested treatment which employer refused to authorize, the Fifth Circuit affirmed the award of medical expenses for treatment by the selected doctor and a specialist to whom he referred claimant. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986).

Once employer has refused to provide treatment or to satisfy claimant's request for treatment, claimant is released from the obligation of continuing to seek employer's approval. *Roger's Terminal*, 784 F.2d at 693, 18 BRBS at 86(CRT); *Atl. & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971); *Rogers v. Pal Services*, 9 BRBS 807 (1978). *See Betz*, 14 BRBS at 809 (in stating this rule, the Board referred to employer's "unreasonable" refusal to provide treatment; since neither the statute nor other case law supports this standard, employer's refusal *need not* be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment). Once employer refuses to provide treatment, claimant need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the work injury, in order to be entitled to such treatment at employer's expense. *Roger's Terminal*, 784 F.2d at 693, 18 BRBS at 86(CRT); *Rieche v. Tracor Marine, Inc.*, 16 BRBS 272 (1984); *Beynum*, 14 BRBS at 958; *Betz*, 14 BRBS at 809.

The employee need not request treatment when such a request would be futile, *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585, 590 n.2 (1981), such as when an employer fires its employee because it did not believe his medical complaints. *Mitchell v. Sun Shipbuilding& Dry Dock Co.*, 7 BRBS 215 (1977), *aff'd mem. in pert. part*, 588 F.2d 823 (3d Cir. 1978).

If an employer has no knowledge of the injury, it cannot have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before he notified employer. *McQuillen*, 16 BRBS at 16. In determining whether employer has "knowledge," the same standard used in other sections of the Act, *e.g.*, 33 U.S.C. §§912(d), 930(a), has been applied. Thus, an employer generally has knowledge of the injury when it knows that an injury is work-related, and knowledge may be imputed to employer where it knows of the injury and has facts that would lead a reasonable person to conclude that it might be liable for compensation and should investigate further. *Mattox*, 15 BRBS 162; *Harris v. Sun Shipbuilding & Dry Dock Co.*, 6 BRBS 494 (1977), *rev'd on other grounds sub nom. Aetna Life Ins. Co. v. Harris*, 576 F.2d 52 (3d Cir. 1978) (the Board subsequently rejected the reasoning in *Harris* to the extent it based liability only on the facts that claimant's injury required treatment and that employer had knowledge of the work-related injury and overlooked the question of whether employer "neglected to provide or authorize" the required treatment in *Jackson*, 9 BRBS 437). Employer has not, however, neglected to provide or authorize treatment where it is aware claimant has an illness, but claimant did not request treatment and thus never gave employer the opportunity to refuse or authorize treatment. *Mattox*, 15 BRBS at 172. In *Mattox*, the Board in addressing Section 12(d) held that employer's mere knowledge of claimant's pulmonary illness did not establish it was aware of a work-related injury as there was no evidence that employer had facts leading to such a conclusion. Thus, the Board held that claimant did not establish employer's neglect or refusal because claimant did not request care prior to the administrative law judge's decision. *Id*.

The Fifth Circuit affirmed an award of medical benefits for treatment by an employee's private physician where the administrative law judge concluded that employer knew or should have known that a military hospital to which it originally sent claimant could not provide other than emergency care to ineligible civilian personnel and thus should have taken the initiative to provide follow-up care. The administrative law judge also found that the fact that the base hospital transmitted some of claimant's records to her private physician suggests that employer acquiesced in her choice of a physician. *Base Billeting Fund, Laughlin Air Force Base v. Hernandez*, 588 F.2d 173, 9 BRBS 634 (5th Cir. 1979); *see also Rieche*, 16 BRBS at 275 (claimant went to employer's infirmary but was told to see his own physician; this is tantamount to refusal or neglect to provide treatment).

Similarly, an employer's failure to object to its employee's resorting to a physician other than the one authorized when the authorized physician was unavailable in an emergency situation was found to be equivalent to authorizing later treatment by that doctor and his chosen hospital and nurse. *Bethlehem Shipbuilding Corp. v. Monahan*, 62 F.2d 299 (1st Cir. 1932); *see also White v. Sealand Terminal Corp*., 13 BRBS 1021 (1981) (Miller, dissenting) (in remanding for further findings, Board acknowledged that an employee need not request authorization for emergency treatment).

"When an employee is told by the employer's physician that 'he is recovered from his injury and requires no further treatment, he has, in effect, been refused treatment by the employer,' and is therefore entitled to reimbursement for all necessary treatment subsequently procured on his own initiative." *Shahady*, 682 F.2d at 970, *quoting Neuman*, 440 F.2d at 911. *See Buckhaults v. Shippers Stevedore Co*, 2 BRBS 277, 279 (1975).

Thus, an employer's physician's statement that the employee is recovered and discharged from treatment may be tantamount to employer's refusing to provide treatment, *Shahady*, 682 F.2d at 970; *Walker v. AAF Exch. Serv.*, 5 BRBS 500 (1977); *Buckhaults*, 2 BRBS 277, as may testimony by employer's physicians at the hearing opposing the requested treatment, *Neuman*, 440 F.2d 908; a mistaken diagnosis by employer's physician, *Cooper Stevedoring of Louisiana, Inc. v. Washington*, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977), *aff'g* 3 BRBS 474 (1976); *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986); *McGuire v. John T. Clark & Son of Maryland, Inc.*, 14 BRBS 298 (1981); or employer's physician's urging that the employee return to work. *Luna Rivera v. Nat'l Metal & Steel Corp.*, 16 BRBS 135 (1984). Where an employer's physician's actions constitute a refusal of treatment, the employee is justified in seeking treatment elsewhere without employer's authorization and is entitled to reimbursement for necessary treatment subsequently procured on his own. *Matthews*, 18 BRBS at 189; *Luna Rivera*, 16 BRBS at 138.

In *Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44(CRT) (D.C. Cir. 1984), *rev'g* 15 BRBS 100 (1980), the court reversed the Board's holding that a physician's conduct constituted a refusal of treatment. The court stated that the physician's positive diagnosis and release for work did not amount to a refusal of treatment; an employer is not considered to have refused to provide treatment merely because its physician proposes a different method of treatment from claimant's physician, unless the treatment is demonstrably improper and medically unacceptable. The court additionally held that the Board erred in concluding that the physician was "employer's physician" so that the physician's "refusal" could be imputed to employer. A chain of referrals does not necessarily establish this relationship, if the physicians are independent; neither does the employer's calling the physician as a witness. *Id.*, 725 F.2d at 78, 16 BRBS at 52(CRT).

A letter stating to the employer's workers' compensation carrier and not to the employee that the employee is recovered is not a refusal. *Betz*, 14 BRBS at 809. A discharge from treatment does not imply that a request for pain medication would be futile. *Scott v. C & C Lumber Co.*, 9 BRBS 815, 824 (1978). A misdiagnosis by the employee's chosen physician does not excuse the employee's failure to request treatment. *Jackson*, 9 BRBS at 439. *See also Baker v. New Orleans Stevedoring Co.*, 1 BRBS 134 (1974) (employer's offer of treatment by one of its panel of physicians and its employee's failure to request treatment preclude reimbursement).

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Where the administrative law judge denied claim for reimbursement of medical expenses because claimant failed to seek employer's authorization for the treatment, the Board remanded the case because he failed to address claimant's assertion that employer refused further treatment prior to his seeking additional treatment, proof of which would excuse claimant from seeking authorization. *Marvin v. Marinette Marine Corp*., 19 BRBS 60 (1986).

The Board affirmed an administrative law judge's determination that decedent's failure to request authorization for treatment bars claimant's right to reimbursement of medical expenses as there is no evidence that employer had previously refused or neglected to provide treatment. *Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in part and rev'd on other grounds sub nom. Lustig v. U.S. Dep't of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989).

The Board rejected employer's argument that the administrative law judge erred in awarding claimant medical benefits where employer had informed claimant's authorized physician that it would not accept any further liability for claimant's medical treatment. Once employer refuses to provide treatment or to satisfy claimant's request for treatment, employer is liable for any treatment claimant subsequently procures on his own initiative which was necessary for treatment of the work injury. *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988) (Feirtag, J., dissenting on other grounds).

The Board reiterated the standard for compensable medical expenses regarding authorization and refusal to provide. In this case, the Board affirmed the administrative law judge's determinations that the treatment in question was not authorized based on the testimony of carrier's claims representative and that the treatment, a laminectomy, was not necessary based on the opinions of three doctors before and after the operation that surgery was unwarranted. Thus, the Board affirmed the administrative law judge's denial of claimant's claim for the cost of the surgery. *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

Where claimant requested authorization for a change in physician from employer and the district director and this request was denied, the Board rejected the argument that the administrative law judge lacked the authority to determine whether claimant was entitled to payment for treatment from the other physician which he subsequently obtained. While Section 7(b) and (c) address the Secretary's authority to oversee claimant's care, Section 7(d) addresses the issue of payment for medical expenses already incurred. The issues of whether claimant requested authorization, whether employer refused the request and whether the treatment subsequently obtained was necessary, are factual issues for the administrative law judge to resolve. The Board affirmed the finding that employer is liable for medical expenses as claimant requested authorization, employer refused to authorize

the treatment, and the administrative law judge found the treatment procured by claimant on his own initiative was necessary. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

The Board remanded the case for further findings where there was evidence which, if credited, could establish that claimant sought, and employer refused, authorization to treat with a doctor. If so, claimant need not have sought authorization subsequently to treat with two other doctors, and claimant is entitled to reimbursement if the treatment was necessary. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

Employer/carrier's mere knowledge of medical treatment does not create an obligation to pay for it; claimant must first request treatment and obtain written authorization before a medical expense is compensable under Section 7(d) and 20 C.F.R. §§702.405, 702.406 (1983). Letters from an insurance carrier requesting information about treatment do not constitute authorization. If an employer or carrier refuses a written request for authorization to seek treatment, such refusal can be considered. If an employer unreasonably delays in acting on a request, it may be deemed a constructive denial, depending on the circumstances. Neither situation, however, is presented in this case, as claimant never requested authorization. *Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 22 BRBS 57(CRT) (D.C. Cir. 1989).

The Board rejected employer's argument that it is not liable for medical services which claimant obtained because they were not authorized and because they were necessitated by claimant's second accident, which employer asserted was not work-related. The Board affirmed the administrative law judge's conclusion that the treatment was work-related and that employer constructively refused to provide treatment after Dr. Young released claimant to return to work. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989).

In order to be entitled to medical expenses, claimant must first request employer's authorization. If claimant's request for authorization is refused by employer, claimant may still establish entitlement to medical treatment at employer's expense if he establishes that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. The administrative law judge's denial of past medical expenses is affirmed, as the claimants failed to seek prior authorization. *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989).

The Board held that the administrative law judge made a rational determination that employer constructively refused claimant's request for authorization of medical treatment by unreasonable delay. Employer was aware that claimant was in severe pain, but failed to respond to claimant's request for at least one month. Employer thus is liable for reasonable and necessary medical care. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

Based on his credibility determinations, the administrative law judge rationally found that the letter sent by claimant's doctor to employer's carrier seeking authorization for a two-day multidisciplinary evaluation at St. Mary's Medical Center did not exclude unlisted procedures such as a discogram. In addition, the administrative law judge's finding that the authorization provided by employer's carrier included authorization for claimant's discogram was rational. Consequently, the Board affirmed the administrative law judge's conclusion that St. Mary's requested, and employer provided, authorization for claimant's discogram, as that determination is rational and supported by substantial evidence. Moreover, the Board affirmed the administrative law judge's finding that claimant's discogram was a reasonable and necessary procedure, based on his rational credibility determinations. Thus, the Board affirmed the administrative law judge's determination that employer was liable for the cost of the discogram and the treatment of claimant's discitis. *Pozos v. Army & Air Force Exch. Serv.* , 31 BRBS 173 (1997).

The Board affirmed the administrative law judge's denial of reimbursement for the cost of the initial visit with Dr. Jackson, as that visit occurred prior to the request for authorization for treatment. Because the denial of those medical expenses was affirmed, the Board also affirmed the denial of reimbursement for travel to Dr. Jackson's office on that occasion. The medical expenses incurred after the request for authorization of treatment, which were awarded by the administrative law judge, were affirmed. *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2001).

In this case, where claimant sought treatment with Dr. Vogel subsequent to his treatment by Dr. Walker, the administrative law judge denied claimant's request for reimbursement for the treatment provided by Dr. Vogel. The Board vacated the administrative law judge's denial and remanded the case for reconsideration, as the administrative law judge did not determine whether Dr. Walker was claimant's or employer's physician, and Dr. Walker's suggestion that claimant be treated elsewhere conflicted with the administrative law judge's finding that Dr. Walker did not refuse to treat claimant. Moreover, the administrative law judge did not consider evidence in the record which, if credited, could support a finding that claimant did seek authorization from employer for treatment by Dr. Vogel, and lastly, the administrative law judge did not consider whether Dr. Vogel is a specialist, and thus, whether employer is required to consent to Dr. Vogel's treatment. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Following remand, the Board affirmed the administrative law judge's conclusion that treatment allegedly administered by Dr. Vogel was not reasonable or necessary as substantial evidence supported the findings that claimant saw Dr. Vogel with regard to an unrelated state court claim, the record contained no treatment records by Dr. Vogel or any indication that claimant went to Dr. Vogel for continued treatment of his work-related condition, and claimant was referred to Dr. Vogel by his attorney and not by any treating physician. The administrative law judge, moreover, rationally concluded that it was not reasonable for claimant to seek treatment with Dr. Vogel because of the considerable distance between claimant's residence in Houma,

Louisiana, and Dr. Vogel's office, located in New Orleans, especially since other equally qualified physicians who were chosen by claimant were in the Houma area. *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003).

In affirming the finding that the responsible employer is liable for medical benefits, the Board rejected SSA's contention that claimant was required to request separate authorization from it in this case, as claimant sought and received prior authorization for treatment not only from the employers who were on the risk at the time, but, more importantly, from the district director. The Board observed that the district director's involvement in this case, coupled with the fact that under Section 7(a), all compensable medical expenses must be reasonable and necessary to treat the work-related injury sufficiently protects the responsible employer's interests with regard to its liability for the medical treatment. *Lopez v. Stevedoring Services of Am.*, 39 BRBS 85 (2005), *aff'd*, 377 F. App'x 640 (9th Cir. 2010).

Employer was aware of decedent's stroke and instructed his wife to seek medical coverage from a private health insurer. The Board thus affirmed the administrative law judge's finding that employer refused to authorize treatment, and therefore that employer is liable for the medical treatment incurred. *Bazor* v. *Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003) (court held status and situs elements not met).

In an order issued subsequent to his initial decision, the administrative law judge granted employer's motion for reconsideration and vacated his earlier award of medical benefits, finding that claimant failed to comply with Section 7(d). On appeal, the Board vacated the administrative law judge's order, holding that Section 7(d) concerns issues of fact and law that are separate and distinct from the request for medical benefits itself, and thus, the issue of Section 7(d) compliance is not raised automatically by a claim for medical benefits. As employer did not raise the issue of Section 7(d) compliance at the hearing below, the Board held that the administrative law judge erred in considering the issue after issuing his initial decision without providing claimant the opportunity to submit evidence. Thus, the Board remanded the case for the administrative law judge to re-open the record in order to reconsider the issue of Section 7(d) compliance. *Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000).

The Board held that where a claimant sustains a second work-related injury, she is entitled to a new choice of attending physician pursuant to Section 7(b) for reasonable and necessary treatment resulting from the new injury; the selection of a new attending physician for the new injury does not constitute a request for a change in physician pursuant to Section 7(c)(2). The Board remanded the case for findings as to whether employer refused or neglected claimant's request for authorization provided by the new physicians and whether the treatment was reasonable and necessary. *L.W. [Washington] v. Northrop Grumman Ship Sys.*, 43 BRBS 27 (2009).

Physician's Report of Treatment

Section 7(d) also requires that in order for the claim to be valid and enforceable against an employer, the employee's treating physician must furnish the employer and the district director with a report of the injury or treatment on a form prescribed by the Secretary within 10 days following the first treatment. The Secretary may excuse the physician's failure to do so if she finds it to be in the interests of justice. This provision was renumbered Section 7(d)(2) by the 1984 Amendments

Prior to the 1986 revision, the regulation at 20 C.F.R. §702.422 delegated the Secretary's authority regarding this provision to the deputy commissioner (now district director) and the administrative law judge. *See Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44(CRT) (D.C. Cir. 1984). The current regulation delegates authority to determine whether the physician has complied with the requirement and whether good cause has been shown to excuse non-compliance only to the Director and his designates, the district directors. *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting). *See also Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000); *Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994) (McGranery, J., dissenting).

In *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 694, 18 BRBS 79, 87(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986), the court found it unnecessary to remand despite the administrative law judge's failure to make a specific finding regarding whether late reporting was excused, as such would only be a mere formality. The court relied on the facts that the administrative law judge and the Board both determined that claimant substantially complied with the regulations and that it had concluded that the employer suffered no prejudice from the minimal delay involved in this case because the employer was aware of the injury at the outset and received actual knowledge of the treatment before the report was received. Thus, the court stated its confidence that the late filing would be excused and that it would be inclined to view a contrary finding as an abuse of discretion under these facts.

The burden of proof regarding compliance with this requirement is on the employee. *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 407, 10 BRBS 1, 8 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977). Such notice must also be provided when the claimant is hospitalized. *Holmes v. Garfield Mem'l Hosp.*, 123 F.2d 166 (D.C. Cir. 1941).

In *Lloyd*, 725 F.2d 780, 16 BRBS 44(CRT), the D.C. Circuit stated that an administrative law judge may excuse a physician's failure to file a report based on an employer's refusal to provide or authorize treatment but is never required to do so as a matter of law. The court distinguished its earlier decision in *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (*per curiam*), *cert. denied*, 459 U.S. 1146 (1983), holding that the failure to file the required report should be excused where medical treatment is reimbursable due to the employer's refusal to provide necessary treatment, based on its conclusion that the

employer did not refuse treatment. The court also noted that the "*Shahady* doctrine" was based on a misreading of *Buckhaults v. Shippers Stevedore Co*., 2 BRBS 277 (1975), in which the Board held merely that such a refusal might be good cause for failure to file. *Lloyd*, 725 F.2d at 787, 16 BRBS at 54-55(CRT). In *Buckhaults* the Board vacated the administrative law judge's findings that the record did not establish that the required report was filed and that no justification for such a failure had been given and remanded the case for a determination as to whether such a report was filed and if not, whether the failure was excusable in light of the employer's refusal to provide further medical care.

Stating that "an administrative law judge's decision to make such a finding is fully within his discretion," in *Rieche v. Tracor Marine, Inc.*, 16 BRBS 272, 276 (1984), the Board affirmed the administrative law judge's finding excusing the doctor's failure to furnish a report within ten days where the employer was aware of the problem, its probable causation and required treatment. The Board held that the administrative law judge did not abuse his discretion in finding it in the interest of justice to excuse the failure to file. *See also Nardella v. Campbell Mach., Inc*., 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975) (excusing failure to file Section 7(d) report is discretionary); *Arnold v. Mast*, 1 BRBS 246 (1974) (administrative law judge within his discretion excused failure to file report where employer's office referred him to the physician).

In *Mattox v. Sun Shipbuilding & Dry Dock Co*., 15 BRBS 162 (1982) (Miller, J., dissenting), the Board rejected the argument that employer's filing of a notice of controversion should excuse the failure of claimant's physicians to properly file the required reports. Note that *Mattox* appears to rely on a misreading of *Buckhaults,* 2 BRBS at 280, as holding "even where employer has explicitly refused to provide further medical care such refusal will not constitute a sufficient basis to excuse claimant's physicians from filing the required reports," *Id.* at 172, when in fact *Buckhaults* held such a refusal could constitute good cause and remanded the case.

An administrative law judge did not abuse his discretion in refusing to excuse the failure to file the report mandated by Section 7(d) where he found the report provided by the doctor did not address treatment or provide an evaluation for the purpose of treatment but rather a disability evaluation for litigation or claims purposes. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978).

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The Board deferred to the Director's position and held that under the revised regulation, the Director, through her delegates, the district directors, has the sole authority to consider whether the failure to timely file a first report of treatment should be excused in the interest of justice. Section 7(d)(2) refers to the "Secretary's" authority, and the regulation at 20 C.F.R. §702.422(c), which formerly referred to the district director or the administrative law judge, now refers only to the Director. The Board remanded the case to the district

director for findings on this issue. The district director's decision will be directly appealable to the Board. The Board noted the potential bifurcation problems with its holding. *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting). *See also Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994) (McGranery, J., dissenting); *Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000).

The decision regarding whether to excuse the failure to file a first report of treatment is discretionary. Furthermore, employer's filing of a notice of controversion does not excuse the failure of the employee's physician to properly file the required report. *Force v. Kaiser Aluminum & Chem. Corp.*, 23 BRBS 1 (1989), *aff'd in part and rev'd in part on other grounds sub nom. Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991).

The Board affirmed the administrative law judge's decision to excuse a physician's failure to file a first report of treatment, as employer offered no evidence that the treatment was unnecessary or unrelated to the work injury. Employer's mere mention of potential financial hardship given its inability to monitor the treatment is insufficient to establish an abuse of discretion on the part of the administrative law judge. *Maguire v. Todd Pac. Shipyards Corp.*, 25 BRBS 299 (1992).

The Board affirmed the administrative law judge's decision to excuse a physician's failure to timely file a first report of treatment, as employer offered no evidence that the treatment was unnecessary or unrelated to the work injury. Employer's argument that it was prejudiced because it had no opportunity to authorize or provide a physician or to monitor the treatment claimant received was insufficient to establish an abuse of discretion. *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992) (R. Smith, J., dissenting on other grounds).

The Board affirmed the district director's determination that claimant's physician's failure to file a first report of treatment within 10 days of the initial treatment should be excused in the interest of justice. The district director based his decision on a letter in which claimant voiced her confusion on how to proceed with advising her medical providers. Moreover, the Board noted that the facts as found by the administrative law judge indicate that claimant and one of her doctors notified employer's claims examiners of her condition and requisite treatment in December 1992. Therefore, the Board held that employer failed to show that the district director abused his discretion in excusing the delayed reporting. *Plappert v. Marine Corps Exch.*, 31 BRBS 13 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997).

The Board remanded the case to the district director for a determination as to whether claimant's doctor timely filed a first report of injury under Section 7(d)(2). The Board noted that the report must be furnished "within ten days following the first treatment" and

the requirement does not apply to the first treatment after SSA came on the risk. *Lopez v. Stevedoring Services of Am.*, 39 BRBS 85 (2005), *aff'd*, 377 F. App'x 640 (9th Cir. 2010).

There is no provision under the Act requiring that a private health insurer provide ongoing medical reports to the employer. In the instant case, the administrative law judge found that employer had knowledge of decedent's injury, and could have investigated the reasonableness of the services provided and charges therefor. *Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003) (court held status and situs elements not met).

Section 7(d)(3)

Section 7(d)(3) states

> The Secretary, may, upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee.

33 U.S.C. §907(d)(3).

While Section 7(d)(3) was not cited, early cases upheld the rights of other entities paying for medical treatment to intervene and seek reimbursement from employer. *Aetna Life Ins. Co. v. Harris*, 578 F.2d 52 (3d Cir. 1978), *vacating and remanding Harris v. Sun Shipbuilding & Dry Dock Co*., 6 BRBS 494 (1977) (Washington, dissenting) (insurance carrier providing coverage for non-occupational injuries or illnesses may intervene to recover amounts erroneously paid for a work-related injury); *see also Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286, 14 BRBS 705 (3d Cir. 1982) (permitting intervention on remand from the Board); *United States v. Bender Welding & Mach. Co*., 558 F.2d 761 (5th Cir. 1977), *rev'g Simmons v. Bender Welding & Mach. Co*., 3 BRBS 222 (1976), and *Love v. Bender Welding & Mach. Co*., 3 BRBS 183 (1976) (government is entitled to reimbursement from the employer for any medical services provided to the employee by a Veterans Administration hospital); *Contractors, Pac. Naval Air Bases v. Pillsbury*, 105 F. Supp. 772 (N.D. Cal. 1952) (employer must reimburse any hospital association or other organization which has contracted with its employee to provide general medical care). *See also LaFortez v. I.T.O. Corp. of Baltimore*, 2 BRBS 102 (1975) (employer must pay entire bill if hospital charges flat rate, even if some treatment unrelated to injury).

In *Harris*, the court held that the question of Aetna's entitlement to reimbursement is a question in respect to a compensation claim under Section 19, as it is derived from the same nucleus of operative facts as the claim for compensation. Moreover, the rights of a private insurer to recover are derivative of claimant's right to benefits; thus, the insurer cannot recover unless claimant meets the pre-requisites for entitlement. *Ozene v. Crescent Wharf & Warehouse Co.*, 19 BRBS 9 (1986).

Subsequently, in addressing the rights of physicians who intervened to recover payment for treatment from employer to also receive payment of interest and attorney's fees, the Ninth Circuit cited Section 7(d)(3) for the proposition that a "party in interest" may petition the Secretary for an award of "the reasonable value of [] medical or surgical treatment" provided to a claimant. *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993). In *Grierson v. Marine Terminals Corp.*, 49 BRBS 27 (2015), the Board held that the ILWU-PMA is a "party in interest" under Section 7(d)(3) to the extent that it seeks

reimbursement for claimant's covered medical expenses. Thus, employer may be held liable for the ILWU-PMA's attorney's fee under Section 28(a).

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The right to reimbursement of medical costs to an intervenor-carrier providing non-occupational disease coverage for a condition ultimately determined to be occupationally-related is solely derivative of claimant's right to reimbursement of such expenses under Section 7. Section 7 provides the exclusive means of holding employer liable for medical benefits and contains no provisions granting non-occupational carriers an independent right to reimbursement. As claimant did not comply with the requirements of Section 7(d), the administrative law judge's finding that the intervenor could not be reimbursed was affirmed *Ozene v. Crescent Wharf & Warehouse Co.*, 19 BRBS 9 (1986).

Claimant has no standing to assert Medi-Cal's rights to reimbursement for medical services it provided to claimant. *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986), *modified on recon.*, 19 BRBS 52 (1986). On reconsideration, the Board modified this decision, holding that the administrative law judge erred in not allowing Medi-Cal to intervene to obtain reimbursement of medical expenses. An insurance carrier providing coverage for non-occupational injuries can intervene and recover amounts mistakenly paid out for injuries determined to be work-related where claimant is entitled to such expenses. The Board remanded the case to the administrative law judge for a determination as to who should reimburse Medi-Cal. If employer has not yet paid claimant, employer must reimburse Medi-Cal, but if employer has paid claimant, claimant will reimburse Medi-Cal. *Quintana v. Crescent Wharf & Warehouse Co.*, 19 BRBS 52 (1986), *modifying on recon.* 18 BRBS 254 (1986).

Where medical providers seeking reimbursement of medical expenses retained their own counsel and intervened in the claim for benefits, the Ninth Circuit determined they have no independent entitlement to medical benefits but do have a derivative right based on claimant's entitlement to recover medical benefits. Consequently, they can seek medical benefits under Section 7(d)(3), and if they do so, they are "person[s] seeking benefits" under Section 28(a) and they are entitled to an attorney's fee. *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993), *rev'g Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991).

Following *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993), the Board rejected employer's contention that the administrative law judge lacked jurisdiction to hear a claim brought by claimant's medical provider, St. Mary's Medical Center. As employer refused to pay for St. Mary's treatment of claimant for her discitis, which resulted from a discogram performed as a result of her work-related back condition, St. Mary's sought to recover claimant's medical benefits to the extent that the benefits were owed to

the provider in satisfaction of unpaid bills, a right it had under Section 7(d)(3). *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997).

Explaining that it is bound by controlling law of the circuit in which the claim arises, the Board rejected employer's contention that the Ninth Circuit's decision in *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993) is in error, and followed that precedent to hold that pursuant to the court's interpretation of Section 7(d)(3) claimant's medical provider is a "person seeking benefits" within the meaning of Section 28(a), entitling the provider's counsel to an attorney's fee payable by employer. *Buchanan v. Int'l Transp. Services*, 31 BRBS 81 (1997).

The Board rejected Dr. Meyers' contention that the administrative law judge erred in failing to hold employer liable for his attorney's fee, holding that the instant case was distinguishable from *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993). Unlike the situation in *Hunt*, Dr. Meyers did not seek payment of benefits for his treatment of claimant; rather, he sought payment for his appearance at a deposition. As his action to seek payment for his time was not a derivative claim for medical benefits under Section 7, Dr. Meyers was not a "person seeking benefits" under Section 28 of the Act, and therefore, was not entitled to an attorney's fee payable by employer. *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

The Board held that ILWU-PMA's Section 17 lien on disability benefits paid to claimants and claim for reimbursement of medical expenses paid must be resolved simultaneously with the settlement agreements entered into by claimants and their employers. As ILWU-PMA intervened in these cases, it is "a party to any claim" pursuant to Section 8(i), and claimants and employers cannot settle claimants' claims under Section 8(i) without ILWU-PMA's explicit involvement. Thus, the Board vacated the settlement agreements and remanded the cases for any action necessary to resolve claimants' claims and ILWU-PMA's lien and medical reimbursement claims. Section 17 and its implementing regulation, 20 C.F.R. §702.162, establish that ILWU-PMA's Section 17 lien is limited to amounts it paid to the claimants for *disability* covered by the Act. Thus, ILWU-PMA's right to recoup the medical expenses it paid on behalf of the claimants is outside the scope of its Section 17 lien. Any right to reimbursement of medical benefits that ILWU-PMA possesses comes within Section 7 of the Act and is derivative of claimants' rights to medical benefits, although, pursuant to Section 7(d)(3), ILWU-PMA may seek an award for the benefits it paid on claimant's behalf. *M.K. [Kellstrom] v. California United Terminals*, 43 BRBS 1, *aff'd on recon.*, 43 BRBS 115 (2009).

On reconsideration, the Board reiterated that since ILWU-PMA's claims forreimbursement of medical benefits are entirely derivative of claimants' claims for medical benefits, ILWU-PMA's claims must be resolved simultaneously with the claimants' claims. If employers and claimants were permitted to settle the claim for medical benefits without ILWU-PMA's participation, employers' liability for medical benefits would be extinguished and

the Plan would be without recourse. Thus, the Board properly held that since the settlements in these cases infringe on ILWU-PMA's derivative right to reimbursement of medical benefits, they must be vacated. *M.K. [Kellstrom] v. California United Terminals*, 43 BRBS 115, *aff'g on recon.* 43 BRBS 1 (2009).

At the Director's urging, the Board clarified its holding to reflect that only those parties with a financial interest in the claim must have their rights resolved simultaneously with the rights of the other parties whose financial interests are also at stake. In these cases, ILWU-PMA has, via its valid Section 17 liens, a financial interest in the disability aspect of the settlements in these cases. As for medical benefits, ILWU-PMA's financial interests, premised on its Section 7(d)(3) reimbursement claims, arose because the settlement agreements included releases for past medical benefits. Thus, the Board reiterated that claimants and employers cannot settle claimants' disability and past medical benefits claims without ILWU-PMA's agreement. The Board stated, however, that the parties could settle any claims for future medical benefits without the Plan's participation as it has no financial interest in such claims. *M.K. [Kellstrom] v. California United Terminals*, 43 BRBS 115, *aff'g on recon.* 43 BRBS 1 (2009).

The Board affirmed the finding that, under Section 7(d)(3), the ILWU-PMA Welfare Plan is a "party in interest" seeking the "value" of medical treatment it provided to the claimant, such that the employer may be held liable for the Plan's attorney's fee under Section 28(a), as the Plan was a "person seeking benefits." *Grierson v. Marine Terminals, Corp.*, 49 BRBS 27 (2015).

The dispute between Wardell Orthopaedics and employer was referred to the OALJ; employer agreed to pay the additional amounts before any hearings were conducted. Thereafter, Wardell filed fee petitions with the administrative law judge. The administrative law judge denied the fee requests under Section 28(a), finding that Wardell did not file "claims" as contemplated by that section and that employer did not "decline to pay any compensation" to claimants. Section 7(d)(3) requires the "party in interest" to file an "application" to be reimbursed the value of medical treatment. The Board held that Wardell's written "applications" for payment filed with the district director constituted "claims for compensation" under Section 28(a). As employer declined to pay compensation within 30 days of receipt of the district director's notice of amounts due, and As Wardell used the services of an attorney to obtain the unpaid medical fees, Wardell is entitled to have its attorney's fees paid by employer, as its interests were not represented by claimants. The Board reversed the denials of employer-paid fees and remanded the case to the administrative law judge for consideration of the fee petitions and objections. *Billman v. Huntington Ingalls Indus., Inc.*, 51 BRBS 23 (2017).

Section 7(d)(4)—Unreasonable Refusal to Submit to Treatment

Section 7(d)(4) of the Act as amended in 1984 provides that the Secretary or administrative law judge may, by order, suspend the payment of all further compensation to an employee during any period in which he unreasonably refuses to submit to medical or surgical treatment, or to an examination by employer's chosen physician, unless the circumstances justified the refusal. Prior to 1984, this authority was held by the Secretary and her delegates, the deputy commissioners (district directors).

The Board has held that this inquiry involves two prongs--the refusal must be both "unreasonable" and not "justified" by the circumstances. *Pettus v. Am. Airlines, Inc.*, 6 BRBS 461 (1977), *rev'd*, 587 F.2d 627, 8 BRBS 800 (4th Cir. 1978), *cert. denied*, 444 U.S. 883 (1979). Noting that the Act states that the Secretary "may" suspend compensation, the Board stated in *Pettus* that the Secretary has discretion to suspend compensation or not, even if the employee fails both prongs. However, as the administrative law judge lacked authority under Section 7(d)(4), the Board did not review his findings that claimant's refusal was not unreasonable or unjustified. *Pettus* involved a proceeding under the D.C. Workers' Compensation Act, and the Fourth Circuit's opinion reversed based on a finding that claimant was barred from benefits under the D.C. Act as a prior Virginia state workers' compensation proceeding found the employee's refusal to be unjustified under that statute and that finding was conclusive on the Board under the full faith and credit clause and *res judicata.* These issues are addressed, *infra,* in that section of the desk book.

In *Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979) (Smith, S., dissenting), the Board held that the burden of proof is on the employer to show that the refusal was unreasonable; if carried, the burden shifts to the employee to show that the circumstances justify the refusal. The Board additionally defined the "reasonableness" of refusal as an objective inquiry, *i.e.*, what course would an ordinary person in claimant's position pursue, and "justification" as a subjective inquiry, *i.e.*, focusing on the individual claimant's particular reasons for refusal. *Hrycyk,* 11 BRBS at 241 -242. *See Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007).

It has been held reasonable as a matter of law for an employee to refuse surgery when no physician says that it would be helpful and his treating physician advises him not to undergo it. *Adams v. Brookfield & Baylor Constr. Co.*, 5 BRBS 512 (1977). Similarly, if the administrative law judge finds that the employee never received notice of a scheduled examination, no unreasonable refusal took place. *Toraiff v. Triple A Mach. Shop*, 1 BRBS 465 (1975).

The Board has held that Section 7(d) does not allow suspension of compensation if claimant refuses to undergo rehabilitation evaluation or training. *Simpson v. Seatrain Terminal of California*, 15 BRBS 187 (1982) (evaluation) (Ramsey, dissenting); *Morgan v. Asphalt Constr. Co.*, 6 BRBS 540 (1977) (training); *but see Naimoli v. Sun Shipbuilding*

& Dry Dock Co., 5 BRBS 590 (1977) (reluctance to undergo rehabilitation treatment should be pursued under Section 7(d)); *Carpenter v. Potomac Iron Works, Inc*., 1 BRBS 332 (1975), *aff'd mem*., 535 F.2d 1325 (D.C. Cir. 1976) (refusal to undergo vocational rehabilitation reasonable because state and federal authorities advised that rehabilitation was not indicated). Section 7(d) does, however, apply to a refusal to be examined by employer's chosen physician for purposes of a rehabilitation evaluation. *Mendez v. Bernuth Marine Shipping, Inc.*, 11 BRBS 21(1979) (Smith, S., dissenting), *aff'd mem.*, 638 F.2d 1232 (5th Cir. 1981).

In dissent in *Simpson*, Judge Ramsey stated that he would hold that where claimant unreasonably refuses to undergo a rehabilitation evaluation, the deputy commissioner can suspend compensation under Section 7(d). 15 BRBS at 193. *Cf . Villasenor v. Marine Maint. Indus., Inc*., 17 BRBS 99 (Ramsey, C.J., dissenting on other grounds), *recon. denied*, 17 BRBS 160 (1985) (Ramsey, C.J., dissenting on other grounds) (refusal to undergo rehabilitation evaluation is a factor to consider in evaluating the extent of disability). *See also Calicutt v. Sheppard Air Force Base Billeting Fund*, 16 BRBS 111 (1984) (affirming deputy commissioner's finding that Section 7(d) does not apply where claimant was physically incapable of undergoing the rehabilitation evaluation at the time requested).

The Fourth Circuit held that the Board erred in finding that, where the employer was paying no compensation, the Act imposes no sanction. Claimant's only excuse for refusing an examination by employer's chosen examining physician was that he lacked confidence in the physician. While that might be a valid reason to refuse him as a treating physician, it does not relieve claimant of the duty to cooperate in an examination by a doctor selected by his employer. Claimant's failure to submit to an examination was arbitrary, and it was an abuse of discretion to excuse his actions. *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977). *See also McCabe v. Ball Builders, Inc.*, 1 BRBS 290 (1975) (affirming administrative law judge's finding that it was not unreasonable for claimant to refuse surgery by employer's physician where he was willing to undergo it by a physician of his choice and his reluctance to be treated by employer's doctor was reasonable given his bitterness towards employer).

Under the pre-1984 Amendment Act, reasonableness of refusal could only be decided by a deputy commissioner; an administrative law judge was not authorized to make findings under section 7(d). *Hike v. Billeting Fund, Robins Air Force Base*, 13 BRBS 1059 (1981); *Ogundele v. Am. Sec. & Trust Bank*, 15 BRBS 96 (1980); *Johnson v. C & P Tel. Co.*, 13 BRBS 492 (1981). In *Unger v. Nat'l Steel & Shipping Co.*, 5 BRBS 377 (1977) (Washington, J., dissenting), the Board vacated an administrative law judge's decision stating that should claimant unreasonably refuse treatment, employer was authorized to suspend compensation. The Board held that the authority to suspend compensation can never be delegated to the employer. Moreover, the authority to suspend compensation rests solely with the Secretary and is not delegated to the administrative law judge; thus, the

administrative law judge cannot address this issue. The Board clarified the procedures to be followed where a claimant seeks benefits and unreasonable refusal is raised under Section 7(d) in *Murphy v. Honeywell Inc.*, 8 BRBS 178 (1978), vacating the administrative law judge's determination that he could not address the issues, including coverage and entitlement to benefits, due to the pending Section 7(d) issue. The Board stated the administrative law judge should determine whether claimant is entitled to compensation. "Once the substantive rights and liabilities are set, the Secretary (deputy commissioner) has something to act upon in deciding the Section 7(d) issue." *Id.* at 181-182. The Board subsequently stated that before remanding a case to the deputy commissioner to make a Section 7(d) finding, an administrative law judge may make a finding as to the nature of the disability, that is, whether it will be permanent or temporary, in order to issue an award of benefits. *Dionisopoulos v. Pete Pappas & Sons*, 14 BRBS 523 (1981), overruling *Hrycyk v. Bath Iron Works Corp.*, 8 BRBS 300 (1978), to the extent it indicated that the administrative law judge could not determine permanency until a determination as to the reasonableness of refusal to undergo surgery was addressed. *Cf. Rucker v. Lawrence Mangum & Sons, Inc.*, 18 BRBS 74 (1986), *rev'd on other grounds mem.*, 830 F.2d 1188 (D.C. Cir. 1987) (administrative law judge may not award compensation under the schedule where surgery could significantly alter the degree of disability and the deputy commissioner has not yet ruled on whether the refusal to undergo surgery was reasonable). These issues are now moot in view of the 1984 Amendments allowing the administrative law judge as well as the district director to make findings under Section 7(d)(4).

In *Murphy*, 8 BRBS at 182, the Board also noted the Director's argument that as Section 7(d) only allows suspension of "further compensation," a suspension can be prospective only and cannot affect past-due compensation payments. While stating that this argument seems compelling, the Board did not address it further, as only procedural issues were before it. The Board has since held that a suspension may not be retroactive to a time prior to claimant's unreasonable refusal.

In *Johnson v. C&P Tel. Co.*, 13 BRBS 492 (1981), employer suspended benefits in May 1977 based on claimant's failure to submit to a medical examination on May 6. Employer did not seek a suspension order from the district director. The Board held that the administrative law judge erred in remanding the case to the deputy commissioner two years later for a determination as to whether benefits due from May 17, 1977, to June 7, 1977, should be suspended as employer failed to follow proper procedure under Section 7(d) by requesting permission to suspend benefits from the deputy commissioner. The Board stated that employer may not invoke Section 7(d) two years after suspending payments on its own initiative, as it contemplates an immediate remedy for an employer when a claimant unreasonably refuses to submit to medical examination or treatment. The Board noted that employer did not allege that it was prejudiced by a lack of medical evidence or request a medical examination under Section 7(e), and it was apparently satisfied with the medical examinations on which the administrative law judge's decision was based. Thus, the Board concluded that no useful purpose would be served by the retroactive application of Section

7(d) in this case and it was not available to employer as a defense. The Board subsequently cited *Johnson* for the proposition that employer must obtain an order authorizing it to suspend benefits before it takes such action in *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989).

The Board, however, has since held that the procedure in *Johnson* is not founded in the statute and overruled the holdings in *Johnson*, 13 BRBS 492, and *Dodd*, 22 BRBS 245, to the extent they require employer to obtain an order prior to suspending compensation and that benefits cannot be suspended during a period of refusal prior to the issuance of an order. *B.C. [Casbon] v. Int'l Marine Terminals*, 41 BRBS 101 (2007). The Board reasoned that the statute does not state that a suspension may be prospective only from the date of the order or that the suspension order cannot be retroactive to the date of the commencement of the refusal but provides for the suspension of benefits "during such time as such refusal continues." Thus benefits may be suspended during the period of claimant's unreasonable refusal to submit to treatment or examination.

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The Board vacated a denial of benefits and remanded the case where the administrative law judge denied benefits on the basis that claimant's unreasonable refusal to undergo back surgery resulted in a break in causation between his injury and whatever disability he had. The administrative law judge erred in analyzing compensability in terms of Section 7(d)(4); before compensation can be suspended under Section 7(d)(4), it must be determined whether claimant is entitled to compensation in the first place. Section 7(d)(4) does not affect causation, moreover, but is a method for suspending compensation for a specific period during which claimant unreasonably refuses to undergo medical treatment. Moreover, while the administrative law judge has the authority under the 1984 Amendments to adjudicate this issue as the case was heard in 1985, he erred in so doing. Under *Johnson*, employer must obtain an order prior to suspending benefits, and it is inconsistent with the statutory language and case law to apply Section 7(d)(4) to terminate payments for a period prior to employer's raising the issue. Thus, the Board held that the administrative law judge erred in applying Section 7(d)(4) retroactively to May 1982, the date employer suspended compensation on other grounds, where it first raised the issue of claimant's refusal to undergo surgery on October 1, 1984. In addition, the administrative law judge did not properly apply the dual test of *Hrycyk*, 11 BRBS 238. While the administrative law judge addressed the reasonableness of claimant's refusal, he did not determine whether employer established it was unreasonable under the objective standard set forth by the Board, and if so, whether claimant established that circumstances justified the refusal. The case was therefore remanded. *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989).

The Board affirmed the administrative law judge's finding that claimant was excused for refusing to attend a medical examination scheduled by OWCP, as it was reasonable and

within his discretion. Under Section 702.410(b), an administrative law judge *may* order that no compensation be paid where an employee fails to submit to a scheduled examination, but is not required to do so. The administrative law judge rationally found that the examination was not essential to the resolution of the causation issue since five doctors agreed that claimant's cervical problem was causally connected, at least in part, to his work-related injury, and it was never suggested or shown that this physician possessed some medical expertise related to the determination at hand. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

The Board vacated the administrative law judge's suspension of benefits pursuant to Section 7(d)(4) based on claimant's refusal to undergo a laminectomy, and remanded the case for reconsideration of whether claimant's refusal was unreasonable and unjustified consistent with the standards set forth in *Hrycyk*, 11 BRBS 238 (1979). The Board held that, in finding claimant's refusal to be unreasonable, the administrative law judge erred in characterizing the medical opinions of record as unanimously recommending that a laminectomy be performed and in failing to address the treating physician's testimony that claimant's refusal was reasonable and that claimant's inability to return to work was unlikely to be affected by surgery. The Board further held that the administrative law judge erred in finding claimant's reasons for refusing to undergo surgery to be unjustified, where he discredited claimant's testimony regarding continuing pain experienced by claimant's wife after undergoing back surgery but failed to address claimant's testimony that he declined the surgery both because the physicians could not assure him that it would enable him to return to work and because too many things can go wrong with surgery. *Malone v. Int'l Terminal Operating Co., Inc.*, 29 BRBS 109 (1995).

The Board affirmed the administrative law judge's suspension of benefits pursuant to Section 7(d)(4), for the duration of the period he found claimant unreasonably refused to submit to an examination by a physician which the administrative law judge ordered and employer scheduled, and where the administrative law judge rationally found that the circumstances did not justify the refusal. Claimant erroneously believed that he had the right to determine the alleged independence and choice of physician. Compensation cannot be suspended retroactively, however, but only from the date of the refusal until claimant complies with the administrative law judge's order. The administrative law judge thus erred in suspending all compensation due, and the case was remanded for a finding on the relevant date. *Dodd v. Crown Cen. Petroleum Corp.*, 36 BRBS 85 (2002) (prior and subsequent appeals were addressed in unpublished decisions, and the Board ultimately affirmed a suspension through the date claimant agreed without conditions to see employer's selected doctor *R.D. [Dodd] v. Crown Cen. Petroleum Corp*, BRB No. 07-0616 (Feb. 20, 2008) (unpubl.)).

The Fifth Circuit affirmed the administrative law judge's finding that claimant did not unreasonably refuse to undergo surgery when the credited doctor stated that even with the

surgery, there is no guarantee that claimant's functional level would improve. *Gulf Best Elec., Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

The Sixth Circuit observed that Section 7(d)(4) requires a finding that the refusal to undergo treatment is both unreasonable and unjustified, with employer having the initial burden to establish that claimant's refusal to undergo treatment is objectively unreasonable. The Sixth Circuit affirmed the administrative law judge's finding that claimant's refusal to undergo psychotherapy was not unreasonable as he did not feel depressed and had no tolerance for antidepressants. Thus, the court affirmed the administrative law judge's denial of employer's motion to compel treatment. *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007).

The Board held that the administrative law judge, by order, may suspend compensation pursuant to Section 7(d)(4) commencing on the date of the claimant's unreasonable refusal to undergo examination or treatment and continuing for the period of "such refusal." The Board overruled the holdings in *Johnson*, 13 BRBS 492, and *Dodd*, 22 BRBS 245, requiring employer to obtain an order prior to suspending compensation and stating that benefits cannot be suspended during a period of refusal prior to the issuance of an order. The Board held that these procedures are not based on any statutory language. The Board affirmed the administrative law judge's finding that claimant's refusal to undergo a medical examination was unreasonable, and thus affirmed the suspension of benefits during the period of the refusal. The Board stated that claimant cannot control the circumstances under which he will be examined by a physician of employer's choosing or refuse to be examined because he "lacks confidence" in the chosen physician. Lastly, the Board rejected claimant's argument that he did not refuse to be examined after the date a claims examiner recommended that employer make an additional appointment with the doctor, which it did not do. Although employer did not schedule the recommended examination, claimant subsequently testified that if another appointment were to be scheduled, he would not attend, and he complied only after ordered to do so by the administrative law judge. Suspension through the date of compliance was thus affirmed. *B.C. [Casbon] v. Int'l Marine Terminals*, 41 BRBS 101 (2007).

Based on its position that claimant's refusal to undergo a surgical eye procedure precluded a finding that claimant's eye injury had reached maximum medical improvement, employer controverted claimant's entitlement to scheduled permanent partial disability benefits for claimant's eye injury. Citing the Fifth Circuit's decision in *Methe*, 396 F.3d 601, 38 BRBS 99(CRT), in which Section 7(d)(4) was applied to the issue of permanency, the Board upheld the administrative law judge's decision to apply the analysis for determining whether a claimant's refusal to undergo surgery was unreasonable or unjustified under Section 7(d)(4) to the issue of whether claimant's eye injury had reached permanency. The Board held, however, that in this scheduled injury case, the administrative law judge erred in requiring employer to establish that the recommended surgical procedure be of aid in restoring a degree of claimant's lost earning capacity. Although this showing is required

in non-scheduled injury cases, it is not applicable to scheduled injury cases, in which loss of wage-earning capacity is not considered in calculating the compensation award. In scheduled injury cases, the reasonableness inquiry is whether the recommended medical procedure is likely to lessen the extent of the claimant's medical impairment, or to relieve his symptoms and the physical effects of his injury, without undue risk to his health or well-being. The case was therefore remanded for the administrative law judge to reconsider whether employer established that claimant's refusal was objectively unreasonable, and if so, whether claimant established that his particular circumstances justified the refusal. *Soliman v. Global Terminal & Container Serv., Inc.*, 47 BRBS 1 (2013).

The Board vacated the ALJ's application of the second part of the two-part Section 7(d)(4) test. It held he did not adequately explain his conclusion relating to the subjective part of that test, i.e., why Claimant's refusal to attend a medical appointment was justified. Because the ALJ did not consider all the relevant evidence as to the justification prong, and as he mischaracterized other evidence, the Board remanded the case for further consideration. On remand, the Board instructed the ALJ to address the justification prong in terms of all of the relevant evidence, including the evidence discussed in the Board's decision, keeping in mind his own correct finding that the Act does not provide Claimant with a choice of physical therapist or PT facility at which to treat. *Jefferson v. Marine Terminals Corp.*, 55 BRBS 21 (2021).

Section 7(e), (f)

Under Section 7(e), when medical questions are raised in any case, the Secretary may have the employee examined by a physician employed or chosen by the Secretary and receive from the physician a report containing an estimate of the employee's physical impairment and other appropriate information. Any party dissatisfied with the report may request a review or a reexamination of the employee by one or more different physicians employed or chosen by the Secretary, which she shall order unless she finds it clearly unwarranted and which shall be completed within two weeks from the date ordered unless she finds that extraordinary circumstances require a longer period. *See* 20 C.F.R. §§702.408, 702.409. *See generally Grbic v. Ne. Stevedoring Co.*, 13 BRBS 282 (1980) (Kalaris, dissenting).

The Secretary may charge the cost of examination or review to the employer if self-insured or to the carrier on the risk in appropriate cases, or to the Special Fund. *See Duty v. Jet Am., Inc.*, 4 BRBS 523, 530 (1976); 20 C.F.R. §702.412(a).

Section 702.408 provides that the Director, through the district directors, may appoint especially qualified physicians to examine the employee whenever medical questions arise regarding the "appropriate diagnosis, extent, effect of, appropriate treatment, and the duration of any such care or treatment for a work injury" or, in the case of death, to make such inquiry as may be appropriate. The physician's findings should be reported as expeditiously as possible, and upon the receipt of reports, appropriate action shall be taken. 20 C.F.R. §702.408.

While the Secretary, as delegated to the district director, has the power to request an impartial examination, she is not required to do so. Moreover, the examining physician's findings on such an examination are not binding on any party but are only intended to provide the district director with a reliable, independent evaluation of the employee's condition. *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585, 589 (1981).

Section 7(f) provides that the employee must submit to a subsection (e) physical examination at a reasonably convenient place designated by the Secretary. No physician selected by the employer, carrier, or employee may attend or participate in any way in the examination, and the examining physician will not be provided with any such physician's conclusion on nature, extent, or cause of impairment unless the Secretary orders otherwise for good cause. The employer or carrier is entitled, on request, to have the employee examined immediately thereafter on the same premises by qualified physicians in the presence of the employee's chosen physician, if any. If the employee refuses to submit to the examination, the proceedings shall be suspended, and no compensation is to be paid during the period of refusal. *See also* 33 U.S.C. §919(h)(containing similar language).

This subsection is implemented by 20 C.F.R. §702.410, which states that claimant must submit to an examination at the designated place and provides for decisions regarding the

suspension of compensation by the district director and administrative law judge, and 20 C.F.R. §702.411, which addresses the impartiality of specialists. *See also* 33 U.S.C. §907(i). The latter regulation emphasizes the attempt to preclude prejudgment by the impartial examiner but allows any party or the Director to provide him with opinions, reports, or conclusions on impairment or its effect on wage-earning capacity if the district director finds good cause. Any party shall be given a copy of all materials provided to the impartial examiner on request.

If the employee does not intend to submit to the impartial examination, he should appeal the district director's Order to the Board. If he does not do so and fails to appear for the examination, the district director should promptly decide, in writing, on the appropriate sanction. If none is imposed, the employer may appeal to the Board. *Grbic*, 13 BRBS at 289. Suspension of compensation for failure to appear is discretionary. *Id.* at 290.

Any dissatisfied party may request review or a reexamination. *Shell*, 14 BRBS at 588. However, there is a limit; an employer who requested four independent examinations and canceled compensation five times was found not entitled to yet another examination. *Grbic*, 13 BRBS at 290

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The administrative law judge erred by stating that the opinions of independent medical experts under Section 7(e) are entitled to "dispositive weight." Such opinions are merely designed to provide the fact-finder a means to obtain a reliable, independent evaluation of a claimant's medical condition. Also, the administrative law judge should have determined whether the doctors are independent examiners under Section 7(i) because the claimant's argument that the doctors credited by the administrative law judge are not in fact independent examiners goes to the weight to be accorded the doctors' opinions. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

The Board affirmed the administrative law judge's denial of employer's motion to remand this case to the deputy commissioner for a second impartial medical exam. Although Section 7(e) generally provides for a second impartial medical exam unless one is "clearly unwarranted," employer had ample opportunity pre-hearing to obtain necessary medical evidence and the report from the first impartial exam was not ambiguous. *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990).

Rejecting employer's contention that there was no "medical question" with regard to the diagnosis and treatment of claimant's back condition, the Board held that the district director acted within her statutory and regulatory authority in ordering claimant to submit to an independent medical examination and in finding employer liable for such examination. Since claimant's treating physician observed that claimant was still symptomatic and advised claimant to consult a neurosurgeon, the Board ruled that based

on the plain meaning of Section 7(e) of the Act and Section 702.408 of the regulations, medical questions existed with regard to claimant's diagnosis, as well as the appropriate treatment for claimant's condition and the nature and extent of his disability. *Augillard v. Pool Co.*, 31 BRBS 62 (1997).

The Board rejected employer's contention that the administrative law judge erred in failing to accord dispositive weight to the opinion of the Section 7(e) independent medical expert, and reaffirmed its holdings in *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585 (1984) and *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 38 (1990), that the reports of Section 7(e) independent physicians are not binding on the fact-finder and, thus, should be weighed along with the other medical opinions in the record. The Board also rejected employer's alternative contention that the administrative law judge is required to give greater weight to the opinions of Section 7(e) medical examiners, holding that, in this case, the administrative law judge appropriately examined the logic of the Section 7(e) independent physician's conclusions and the evidence upon which they were based and rationally found the physician's opinion to have a questionable basis. *Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014), *aff'd sub nom. Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016).

The Fourth Circuit affirmed the Board's decision and rejected employer's contention that the administrative law judge was required to give dispositive weight to the report of the independent medical examiner, pursuant to Section 7(e). Employer's reading would nullify the second sentence of Section 7(e), which permits reexamination of the claimant if any party is dissatisfied with the results of the independent examination. The opinion of the independent examiner is to be weighed along with the other opinions of record. In this case, the administrative law judge credited the opinions of claimant's doctor and employer's doctor that claimant has PTSD due to the work accident over the opinion of the independent examiner. As the conclusion is supported by the substantial evidence on the record as a whole, the court affirmed the award of benefits. *Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016).

The Board held that upon the referral of a case to the OALJ, the authority to suspend benefits as a result of an employee's failure to attend a medical examination scheduled by the Secretary rested with the administrative law judge and not the district director. Sections 7(f) and 19(h) of the Act are silent as to this issue, but 20 C.F.R. §702.410(b) gives this suspension authority to the district director or the administrative law judge. As neither the Act nor regulations allows for simultaneous jurisdiction over this issue, and in order to avoid the potential for administrative confusion, the Board held that only the entity before whom the case is pending may issue an order suspending compensation. The Board thus vacated the district director's suspension order, as the case had been transferred to the OALJ at the time he issued his order. On reconsideration, the Board rejected the argument that under Section 19(h), which like Section 7(f) provides for the suspension of proceedings as well as compensation where claimant refuses to attend an ordered examination, claimant

was precluded from appealing the suspension order because "proceedings" are also suspended. The Board stated that Section 19(h) would affect proceedings on the merits but cannot affect the right to appeal, as such an interpretation would make such orders unreviewable. *L.D. [Dale] v. Northrop Grumman Ship Sys., Inc.*, 42 BRBS 1, *recon. denied*, 42 BRBS 46 (2008).

Section 7(g) – Fees

Section 7(g) provides that all fees and other charges for medical examinations, treatment, or services shall be limited to the prevailing charges in the community for such treatment and may be regulated by the Secretary. It further provides that the Secretary shall issue regulations limiting the nature and extent of medical expenses chargeable against the employer without authorization.

The regulation provides that fees charged by medical providers shall be limited to the charges prevailing in the community in which the provider is located and shall not exceed the customary charges or the provider for the same or similar services. 20 C.F.R. §702.413. Section 702.413 further states that where a dispute arises concerning the amount of a medical bill, the Director determines the prevailing rate using the OWCP Medical Fee Schedule to the extent appropriate, and where not appropriate, may use other state or federal fee schedules. [Note that Section 702.413 cites to 20 C.F.R. §10.411, which is no longer the correct regulation. *See* http://www.dol.gov/owcp/regs/feeschedule/fee/fee09/view09.htm]. The Director's finding that a charge disputed under Section 702.414 exceeds the prevailing community charge is sufficient evidence to warrant further proceedings under that section and to permit the Director to require claimant to select another medical provider.

Section 702.414 states that the Director may, upon written complaint of an interested party or his own initiative, investigate any fee or charge that appears to exceed prevailing community rates for the same or similar services. The initial investigation may be informal, but if it does not resolve the issue, further proceedings may be undertaken. The regulation states that a provider's claim that the OWCP fee schedule does not represent the prevailing rate will be considered only under the specific circumstances delineated in Section 702.414(a)(1)(i)-(iv). After proceedings under this section, the Director must make specific findings and provide notice of these findings.

The necessary parties at such a hearing are the person whose fee or charge is in question and the Director, or their representatives. The employer or carrier may also be represented, as may other parties or associations with an interest in the proceedings, at the administrative law judge's discretion. 20 C.F.R. §702.416. If the final decision and order upholds the Director's finding that the charges are excessive, the person claiming the fee or charge has 30 days to make the necessary adjustment. If he refuses, he shall not be authorized to provide further treatments, services, or supplies, and any subsequent fees or charges will not be reimbursed, even if necessary and appropriate, unless rendered in an emergency. 20 C.F.R. §702.417. At the termination of proceedings under this section, the district director must determine whether further proceedings under 20 C.F.R. §702.432, which provides procedures for debarment of health care providers and claims representatives, should be initiated.

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The Board held that the administrative law judge erred in placing the burden of proof on the physician to prove that his fees did not exceed prevailing community charges, as employer bears this burden as the proponent. The Board further held that employer did not meet this burden, as its evidence was insufficient because its sample on prevailing community charges was faulty on a number of grounds. As employer did not meet its burden of proof, the administrative law judge's denial of medical fees was reversed. *Loxley v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 215 (1990), *rev'd*, 934 F.2d 511, 24 BRBS 175(CRT) (4th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992).

On appeal, the Fourth Circuit reversed the Board's determination that employer, rather than the medical care providers, bears the burden of proof in establishing that disputed medical charges exceed prevailing community rates. The court stated that placing the burden of proof on the medical provider was consistent with the traditional common law rule that the proponents carry the burden of proof and Sections 702.415 and 702.416 of the regulations. The court, without purporting to determine how a physician could or should sustain this burden, found that he failed to do so in this case. The Fourth Circuit also reversed the Board's holding that the process used by employer for determining the prevailing rate for a medical service was inadequate where employer based its determination of what is the prevailing rate on data from employer's self-insured health benefit plan for its employees. In determining the prevailing rate, the court held that employer need not differentiate between generalists and specialists, as the Act and regulations refer to comparable treatment, but do not distinguish among medical providers by specialty. Moreover, it was improper for the Board to hold that employer's methodology in determining the prevailing rate was inadequate for the reason that employer did not submit evidence demonstrating the charges to patients in the relevant geographical area who were covered under any other type of plan, where the data used by employer represented greater than 70 percent of the physicians in the applicable geographic area. *Newport News Shipbuilding & Dry Dock Co. v. Loxley*, 934 F.2d 511, 24 BRBS 175(CRT) (4th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992).

Claimant is not afforded the benefit of a presumption of reasonableness of treatment under Section 7 by virtue of Section 20(a) of the Act. Although neither Section 7 of the Act nor the regulations explicitly assigns the burden of proof, claimant is not relieved of the burden of proving the elements of her claim for medical benefits. In determining the reasonableness of the costs of treatment claimant, a resident of Austin, Texas, procured at a pain center in Boston, the administrative law judge did not err by comparing the costs of the Boston treatment to that of similar treatment available in Houston, Texas. Although 20 C.F.R. §702.413 requires that a provider's fees are limited to prevailing community charges for similar care in the community in which the medical care is located, that regulation acts as a ceiling for compensable fees and does not preclude the administrative law judge from awarding a lesser amount where comparable less expensive treatment was

available to claimant locally. While the proximity of the medical care to claimant's residence is a factor to be considered in determining the reasonableness of medical treatment, where competent care is available locally, claimant's medical expenses may reasonably be limited to those costs which would have been incurred had the treatment been provided locally. In the instant case, the administrative law judge compared treatment available at a local pain center in Houston with the treatment procured by claimant in Boston, and, after considering the treatment available, the professional accreditations and success rates, and the experience of each clinic's director, rationally determined that adequate comparable treatment was available locally at a lesser cost. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112, 114-115 (1996).

Section 702.413, 20 C.F.R §702.413, provides that the use of fee schedules is appropriate when there is a dispute about the prevailing community rate of a given medical service or supply. In this case, there was no dispute concerning this rate, and thus the Board held that, contrary to the administrative law judge's finding, resort to a fee schedule was not necessary. The Board thus modified the administrative law judge's decision to award the actual cost of the necessary hearing aids. *Green v. Ceres Marine Terminals, Inc.*, 43 BRBS 173 (2010), *rev'd on other grounds*, 656 F.3d 235, 45 BRBS 67(CRT) (4th Cir. 2011).

Wardell Orthopaedics provided medical care for claimant's work injury. Wardell submitted an invoice to employer for $8,113. Employer disputed the bill and made a payment of $3,133.60. Wardell filed a notice with the district director, seeking payment in full. Upon investigation, the district director calculated that, under the OWCP Medical Fee Schedule, employer owed an additional $1,374.26. Employer disagreed and requested a hearing on the matter. Thereafter, employer moved to dismiss the claim, asserting, *inter alia*, that the administrative law judge did not have jurisdiction to address the reimbursement claim because employer's defense against the medical charges is based on several private re-pricing contracts. The administrative law judge denied the motion to dismiss. The Board accepted this interlocutory appeal and affirmed the administrative law judge's denial of the motion to dismiss. The Board held that Section 19(a) of the Act grants the administrative law judge jurisdiction to resolve questions "in respect of" a claim under the Act, and the regulations provide that medical services and medical fee rates are issues with respect to a claimant's claim under the Act. 33 U.S.C. §907(g); 20 C.F.R. §§702.413-417. Thus, the district director and the administrative law judge have jurisdiction to address the fees an employer owes to a medical provider under the Act; the existence of the private contracts does not divest the administrative law judge of jurisdiction entirely. The Board remanded the case for the administrative law judge to resolve the issue of the amount owed to Wardell under the Act. However, the Board held that the administrative law judge does not have jurisdiction to address any contractual defenses employer may have, as interpretation of the contracts is not "in respect of" a claim under Section 19(a). Proceedings on remand must be limited to the parties' rights under the Act and the regulations. *Watson v. Huntington Ingalls Indus., Inc.*, 51 BRBS 17 (2017). *See also Billman v. Huntington Ingalls Indus., Inc.*, 51 BRBS 23 (2017) (because the administrative law judge had jurisdiction to address the amounts employer owed Wardell, she had jurisdiction to address Wardell's fee petitions).

Section 7(h)

Section 7(h) addresses third party injuries, providing that the employer's liability for medical treatment is unaffected by the fact that its employee was injured through the fault or negligence of a third party not in the same employ, or that the third party is being sued; however, the employer has a cause of action against the third party to recover any amounts which it paid for medical treatment in accordance with Section 33(b). *See Doleman v. Levine*, 295 U.S. 221 (1935).

For a detailed history of the use of this provision, *see Cella v. Partenreederei MS Ravenna*, 529 F.2d 15 (1st Cir. 1975), *cert. denied*, 425 U.S. 975 (1976).

Section 7(i)

Unless the parties agree, the Secretary shall not employ or choose any physician to make subsection (e) examinations or reviews who, during such employment or for the two years prior thereto, has been employed by, accepted or participated in any fee relating to a workers' compensation claim from any insurance carrier or self-insurer. This subsection is implemented by 20 C.F.R. §702.411(c) .

The Board held that an administrative law judge erred in not addressing claimant's argument that a physician did not meet these criteria because some of employer's clinics retained him as a consulting orthopedic surgeon; the administrative law judge found it was irrelevant as claimant did not establish prejudice. The Board stated that Section 7(i) is quite specific, and there is no requirement that prejudice be shown. *Jones v. I.T.O. Corp. of Baltimore,* 9 BRBS 583 (1979) (S. Smith, dissenting).

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The Board held that the administrative law judge erred in refusing to address claimant's contention that the 2 doctors credited by the administrative law judge because they were independent examiners were not in fact independent examiners. While the case was before the administrative law judge, the parties had agreed, based on the administrative law judge's recommendation, to have claimant examined by independent medical examiners, and claimant's argument that the physicians selected are not impartial under Section 7(i) because they accepted fees from employers for examinations in other cases must be resolved by the administrative law judge on remand. *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

Regardless of whether claimant offers evidence of a physician's receipt of payment from employer, the plain language of Section 7(i) states that the Secretary *shall not* select a physician to perform an independent medical examination who, within the prior two years, has been employed by, or accepted or participated in any fee relating to a worker's compensation claim from any insurance carrier or any self-insurer. On remand for reconsideration of an order suspending compensation for failure to attend an examination ordered under Section 7(e), the district director must reconsider whether the physician met the criteria. On reconsideration, the Board declined to address employer's argument that "only physicians who have been in some form of direct employment with an employer within two years of an independent medical examination would be disqualified" under Section 7(i), finding it unnecessary to further interpret the section. The Board did clarify that a physician who merely treats an employee of an employer is "employed by" claimant, not employer. *L.D. [Dale] v. Northrop Grumman Ship Sys., Inc.*, 42 BRBS 1, *recon. denied*, 42 BRBS 46 (2008).

In this case where the administrative law judge summarily found that Dr. Brown's appointment by OWCP as an independent medical examiner was not proper, yet where he credited Dr. Brown's opinion, the Board vacated the denial of benefits. The Board determined that the parties argued opposing positions based on the same facts related to Dr. Brown, but the administrative law judge did not make any findings of fact on this issue. On remand, the administrative law judge must discern the relevant facts, apply the Section 7(i) and its implementing regulation, and determine whether Dr. Brown may be appointed as an IME. Specifically, Dr. Brown was hired and paid through an independent company, whose clients are often carriers, and the question is whether this constitutes Dr. Brown's having been "employed by" or "accepted" payment from a carrier or self-insurer, as any doctor who has done so, within two years of the examination in question, "shall not" be an independent examiner unless the parties agree. If the administrative law judge finds that Dr. Brown qualifies as an independent examiner, his opinion may be weighed with the other medical opinions of record. If not, then the administrative law judge should strike Dr. Brown's opinion from the record and remand the case to the district director for a proper IME appointment, or he must arrive at another remedy to which the parties agree. *Leyva v. Serv. Employees Int'l., Inc.*, 46 BRBS 51 (2012).

Section 7(k)

This subsection provides that nothing in the Act prevents an employee whose injury or disability has been established from relying in good faith on treatment solely by prayer or spiritual means, in accordance with the tenants of a recognized church or religious denomination, by an accredited practitioner of such a church or religious denomination, and on nursing services rendered in accordance with its tenets and practice, without suffering loss or diminution of compensation or benefits under the Act. This subsection does not exempt an employee from all physical examinations required by the Act. 33 U.S.C. §907(k)(1).

Subsection (k)(2) provides that an employee who refuses medical or surgical services solely because he relies on prayer or spiritual means alone for healing in adherence to the tenets and practice of a recognized church or religious denomination has not "unreasonably refused" medical or surgical treatment under subsection (d).

Section 702.401(b) implements this provision and further provides that a recognized church or religious denomination shall be any religious organization recognized by the Social Security Administration for the purpose of reimbursement of treatment under Medicare or Medicaid or by the IRS for purposes of tax exempt status.

However, the definition of "physician" authorized to provide care in Section 702.404 does not include naturopaths, faith healers and other practitioners of the healing arts not specifically listed in the section.